Part 121—Certification and Operations: Domestic, Flag, and Supplemental Air Carriers and Commercial Operators of Large Aircraft

This change incorporates two amendments:

Amendment 121–244, Random Drug Testing Program, adopted November 22, 1994. This amendment affects Appendix I. The preamble to this amendment starts on page P–1049.

Amendment 121–245, Alcohol Misuse Prevention Program, adopted November 22, 1994; this amendment affects Appendix J. The preamble to this amendment starts on page P–1060.

Bold brackets indicate the most recently changed or added material.

Technical amendments were published to Amendment 121–237 (Alcohol Misuse Prevention Program) in 59 FR 53085, October 21, 1994. These amendments correct typographical errors or clarify provisions to reflect the FAA's actual intent in Appendix J, sections IV, V, and VII. These revisions are in bold brackets and are denoted by an asterik.

Corrections to Amendment 121–240 were published in 59 FR 66672, December 28, 1994, changing ''complies'' to ''comply'' (see page App. I–1) and changing ''problems'' to ''programs'' (see page App. I–8). These corrections are in bold brackets and are denoted by an asterik.

Page Control Chart

Remove Pages	Dated	Insert Pages	Dated
P–1049	Ch. 7	P–1049 through P–1066	Ch. 8
Appendix I	Ch. 6	Appendix I	Ch. 8
Appendix J	Ch. 4	Appendix J	Ch. 8

Suggest filing this transmittal at the beginning of the FAR. It will provide a method for determining that all changes have been received as listed in the current edition of AC 00–44, Status of Federal Aviation Regulations, and a check for determining if the FAR contains the proper pages.

Good Cause for Immediate Adoption

The FAA finds that notice and public comment for this rulemaking is impracticable and contrary to the public interest. This amendment contains a minor adjustment to the rule based on the fact that sufficient numbers of modified EMK will not be available by the compliance date of December 2, 1994. In addition, the FAA finds that there will be no adverse affect on safety since the required number of protective gloves will be made available on each aircraft.

Comments on the amendment are invited, however, and the Administrator may amend or rescind the amendment in view of public comment. Comments should identify Docket No. 27926 and be submitted in triplicate to the address provided above. All comments will be available for public review, both before and after the closing date for comments.

Conclusion

For the reasons discussed in the preamble of Amendment No. 121–242, issued September 26, 1994, and based on the findings in that Regulatory Flexibility Determination and that International Trade Impact Analysis, the FAA has determined that this regulation is not a significant regulatory action under Executive Order 12866. In addition, it is certified that this regulation will not have a significant economic impact, positive or negative, on a substantial number of small entities under the criteria of the Regulatory Flexibility Act. This regulation is not considered significant under DOT Regulatory Policies and Procedures (44 FR 11034; February 26, 1979).

The Amendment

Accordingly, 14 CFR part 121 is amended effective December 2, 1994.

The authority citation for part 121 continues to read as follows:

Authority: 49 U.S.C. app. 1354(a), 1355, 1356, 1357, 1401, 1421–1430, 1472, 1485, and 1502; 49 U.S.C. 106(g) (revised, Pub.L. 97–449, January 12, 1983).

Amendment 121–244

Random Drug Testing Program

Adopted: November 22, 1994 **Effective: January 1, 1995**

(Published in 59 FR 62218, December 2, 1994)

SUMMARY: In response to public comments, petitions submitted by industry, and on their own initiative, the Federal Aviation Administration (FAA), the Federal Highway Administration (FHWA), the Federal Railroad Administration (FRA), the Federal Transit Administration (FTA), the Research and Special Programs Administration (RSPA), and the United States Coast Guard (USCG) (the operating administrations or "OAs") have revised their random drug testing rules. As revised, the rules provide that the OA may lower the minimum random drug testing rate to 25 percent if the industry-wide (e.g., aviation, rail) random positive rate is less than 1.0 percent for 2 calendar years while testing at 50 percent. The rate will return to 50 percent if the industry random positive rate is 1.0 percent or higher in any subsequent calendar year. The industry-wide random positive rate for each transportation industry will be calculated from data submitted to the OAs and announced yearly by the respective Administrator or the Commandant of the Coast Guard. Based on this revision, the random drug testing rate for the railroad and aviation

Current Drug Testing Requirements

In 1988, the Department of Transportation issued six final rules mandating anti drug programs for certain transportation workers in the aviation, interstate motor carrier, pipeline, maritime and transit industries, and expanded the requirements of the existing FRA rule. The rules included requirements for education, training, testing and sanctions. The testing component of each program included pre-employment, post-accident, reasonable suspicion (reasonable cause), periodic (for those subject to periodic medical examinations), random, and return to duty drug testing for approximately four million workers in safety-sensitive positions. After a phase-in of one year, the random testing provisions of the rule required a minimum testing rate of at least 50 percent per year. Implementation of the testing requirements was delayed in FTA and FHWA due to litigation. Employers regulated by FHWA began random testing of interstate drivers in 1991 and 1992, and will begin random testing of intrastate drivers in 1995 and 1996. FTA will begin random testing of large transit operators in 1995 and small transit operators in 1996.

Current Alcohol Testing Requirements

On February 15, 1994 (59 FR 7302), the FAA, FHWA, FRA, FTA and RSPA published final rules limiting alcohol use by transportation workers. Four of the OA rules (FAA, FHWA, FRA and FTA) were required by the Omnibus Transportation Employee Testing Act of 1991. RSPA adopted similar, but more limited requirements, based on its own statutory authority.

The FAA, FHWA, FRA and FTA rules require random testing of safety-sensitive employees in those industries. The rules provide for an initial minimum random alcohol testing rate of 25 percent. The industry's (e.g., aviation, motor carrier, rail or transit) random alcohol rate may be adjusted based on a performance standard related to its random alcohol violation rate. Because of safety concerns, two years of data are necessary to justify lowering the random alcohol testing rate; one year of data is sufficient to raise it. The OA (in conjunction with the OST Office of Drug Enforcement and Program Compliance) will review the data and announce in the *Federal Register* the minimum annual random alcohol testing rate applicable in the calendar year following publication. If the industry violation rate is 1 percent or greater during a given year, the random alcohol testing rate will be 50 percent for the calendar year following the OA Administrator's announcement that the rate must change. If the industry violation rate is less than 1 percent but greater than 0.5 percent during a given year (for two years if currently at 50 percent), the random alcohol testing rate will be 25 percent for the calendar year following the OA Administrator's announcement that the rate must change. If the industry violation rate is less than 0.5 percent during a given year (for two years if testing at a higher rate), the random alcohol testing rate will be 10 percent the next calendar year.

The ANPRM

On December 15, 1992 (57 FR 59778), DOT published an advance notice of proposed rulemaking (ANPRM) requesting public comment and submission of data concerning whether there are less costly alternatives to the current random testing program that can maintain an adequate level of deterrence and detection of illegal drug use. The ANPRM asked for comment on a number of alternatives to the current 50 percent random testing rate that DOT could consider. These alternatives included:

(1) Making an across-the-board modification of the rate for all DOT anti-drug programs;

(2) Modifying how the random testing rate is implemented (e.g., frequency of testing, etc.);

(3) Making a selective modification of the rate by:

(a) operating administration (e.g., FAA or FRA could modify its rate);

(b) job category (e.g., pilots, train engineers);

(6) Combining some of the alternatives.

Comments to the ANPRM

Over 115 comments were filed in response to the ANPRM. Commenters included governmental agencies, trade associations, regulated entities, unions, contractors and consultants, and individuals. Suggestions ranged from abolition of all random testing requirements to greatly increasing the current 50 percent testing rate.

About two-thirds of the commenters favored a random testing rate of 25 percent or less. These commenters argued that the drug problem is not as widespread as originally believed, and that a 25 percent rate would provide substantial savings while maintaining a serious deterrent effect. Many focused on the cost of the current program and argued that the savings from reducing the incremental number of tests and associated non-productive time would be significant. Others took a broader view and noted that other types of tests, training and education were also deterrents.

Over a dozen commenters supported the current minimum 50 percent random testing rate. They argued that a decrease in the testing rate would increase recreational drug use and undermine the deterrent purpose of the program. Several stated that the data were inadequate to justify a reduction and that costs would not drop because the lower volume would result in higher per test costs. Others took an "if it ain't broke, don't fix it" attitude.

A few commenters argued that the rate should be increased. These commenters stated that a greater perception of getting caught would result in less drug use. One noted that at a 50 percent testing rate, some employees are never tested while others are tested two or more times per year.

In terms of a triggering group, most favored an industry-wide approach. There was some support for setting the rate by job categories tempered by the concern that such differentiation not be arbitrary. A few commenters suggested that employers should have flexibility to set the rate at whatever level they thought best, based on their own past experience.

Technical Meeting

The Department held a public meeting on technical issues related to workplace random testing in Washington, DC, on February 1 and 2, 1993. The meeting, which included presentations by experts from federal agencies, the military, academia, and private industry, was attended by over 200 people. Transcripts of the meeting are included in the docket.

The NPRM

The Department published a notice of proposed rulemaking (NPRM) on February 15, 1994, (59 FR 7614). The NPRM proposed that the random testing rate could be lowered to 25 percent by an operating administration if the industry-wide random positive rate were less than 1.0 percent for 2 consecutive calendar years while testing at 50 percent. The rate would increase back to 50 percent if the industry random positive rate were 1.0 percent or higher for any entire subsequent calendar year. Under the proposal, it was possible that different industries would be subject to different rates in a given calendar year. The NPRM asked for comment on a variety of ways to fine tune this basic approach.

The NPRM also proposed that each year each Administrator (or Commandant of the Coast Guard) would publish in the *Federal Register* the minimum required percentage for random testing of covered employees during the calendar year following publication. Any random testing rate change indicated by industry performance would then occur at the beginning of that calendar year.

In the NPRM, the Administrator's decision to authorize a decrease (or to require a return to the 50 percent rate) would be based on the overall positive rate in the industry. The primary source of

DOT agency to which the employer is subject.

The proposal included several provisions to provide employers greater flexibility or to provide greater clarity. In addition, RSPA and USCG proposed minor amendments to conform their rule to the Departmental system and eliminate unnecessary provisions.

Comments to the NPRM

There were approximately 70 comments filed. (Some commenters filed identical, or very similar, comments in different dockets or several times during the rulemaking.)

Approximately forty comments were filed by aviation commenters, nine by the motor carrier industry, eight by maritime interests, seven by transit, three by pipelines, and two by rail. Forty-four of the commenters were regulated entities, eighteen represented trade associations, four represented unions, two were from consultants, and one was from a governmental entity.

Almost all the commenters supported reduction of the testing rate and the increased flexibility in tying the testing rate to the positive rate in a specified population. The commenters differed, however, on how low the rate should be and what positive rate was low enough to justify reduction. Forty-two of the commenters, including all of the aviation interests, supported a 10 percent testing rate, in some form. The Air Transport Association/Airline Industrial Relations Conference, for example, wanted a permanent rate of 10 percent for the larger commercial air carriers (prt 121 and 135 certificate holders.) Alternatively, they suggested that the Department set a testing rate ranging between 25 and 10 percent for the entire industry or airline segment, or adopt the three-tiered system in the alcohol testing rules. The Regional Airline Association, on the other hand, suggested that 10 percent of covered employees be tested annually for either drugs or alcohol. The Metropolitan Transit Authority of New York, the American Movers Conference, the Transportation Trade Department of the AFL-CIO, and the American Trucking Associations also argued for a 10 percent testing rate.

Twenty-three commenters supported the NPRM proposal of a reduction to 25 percent. These included all of the marine commenters (American Maritime Officers, American Waterways Operators, Inland Steel, the International Association of Drilling Contractors, the Lake Carriers' Association, Sailboats, Inc., Sealand, and the Transportation Institute), all of the pipeline commenters (Columbia Gas, Enron and Questar), the Association of American Railroads, six motor carrier commenters (including the American Bus Association, the Owner-Operator Independent Drivers Association and the Regular Common Carrier Conference), several transit commenters (the American Public Transit Association, the South Bend Public Transportation, and the Washington Metropolitan Area Transit Authority), the State of Michigan Department of Transportation, and the Institute for a Drug-Free Workplace. In general, these comments reiterated and supported the arguments made in the NPRM.

Several commenters, including the Substance Abuse Program Administrators Association, Substance Abuse Management, the Bay Area Rapid Transit, and Connecticut Transit supported maintaining the current 50 percent testing rate. They stated that the current rules are effective, that a reduction in the rate alone would not produce significant savings, and that DOT should explore other cost-saving alternatives. One transit system believed that a reduction in the testing rate by DOT would undermine local discretion to continue testing at a higher rate.

Commenters suggested a number of variations to the reduction mechanism proposal in the NPRM. The Regulated Common Carriers wanted the Department to use a 2.0 percent positive rate benchmark for 25 percent random testing. The American Trucking Associations (ATA) had a lengthy and complex submission. It wanted DOT to lower the testing rate to 25 percent by January 1, 1995; drop to 10 percent if a motor carrier's positive rate were less than 1.5 percent; change the 2 year rule to 1 year; and randomly collect past data from carriers. ATA claimed that reduction to 25 percent would save

smaller aviation and motor carrier interests) suggested the rates be determined for each company or operator. The Air Line Pilots Association and the Allied Pilots Association suggested that the rates be determined by job category. Several comments favored a breakdown by industry segment (e.g., intercity buses, aviation contractors, offshore mobile drilling units) or by state.

Most of the commenters were anxious to institute a reduction in the testing rate as soon as possible and to ensure that the testing rate would not be raised without good cause. A number of commenters were concerned by the relatively long time before there was any possibility of reducing the random testing rates in most of the industries. These commenters, therefore, wanted the Department to expedite or "fast track" the potential reduction in testing rates. Many marine and motor carrier commenters, for example, asked that DOT either randomly collect or specifically require reports of past years' data that employers are required to maintain. These commenters suggested that DOT should consider this retroactively-collected data to determine whether a reduction is warranted.

There were a number of comments on the appropriate number of years for lowering or raising the random testing rate. For example, several commenters strongly argued that DOT should allow the testing rate to be reduced based on one year of data. The Air Transport Association stated that an increase in the testing rate should be based on either 3 years of data that demonstrate a clear upward trend or a significant increase in any 1 year.

Several commenters were concerned that recent changes in the U.S. Department of Health and Human Services Mandatory Guidelines for Federal Workplace Drug-Testing Programs, as incorporated in 40 CFR part 40, will result in more frequent identification of the presence of THC (the active ingredient in marijuana) on screening tests, thus leading to an increase in the number of positive tests. These commenters argued that the Department should make a special accommodation in the rules to account for this expected increase.

Available Data

In addition to the public comments to the rulemaking, the Department considered the following drug testing data in the regulated industries, the Department's civilian workforce, and the U.S. Coast Guard military personnel. The data do not include refusals to be tested. The operating administration data reflect phase-in of random testing from 25 percent to 50 percent unless otherwise noted.

Aviation

Random Testing

	1990*	1991*	1992*	1993
Total Number of Random Tests	84,585	170,186	183,176	182,482
Number of Positives	445	1,258	1,307	960
Percent Positive	0.53	0.74	0.71	0.53

(*These numbers are slightly different from the NPRM due to further examination and correction of some reported data.)

Post-Accident Drug Positive Rates

	1990	1991	1992	1993
Total Post Accident Tests	248	481	459	343
Number of Positives	2	2	0	0
Percent Positive	0.8	0.4	0	0

Total Number of Random Tests	35,228	50,436	42,599	42,199
Number of Positives	365	447	336	303
Percent Positive	1.04	0.88	0.79	0.7

Post-Accident Drug Positive Rates

1987	1988	1989	1990	1991	1992	1993
5.1%	5.6%	3.0%	3.0%	1.1%	1.8%	2.0%

Reasonable Cause Drug Positive Rates

[Includes tests after violations of operating rules and personal injuries]

1987	1988	1989	1990	1991	1992	1993
5.4%	4.7%	3.6%	1.8%	1.9%	1.9%	1.9%

In July 1991, the FRA initiated a comparative study of different random testing rates and the impact on deterrence, as measured by the positive rate. The study compared four railroads testing at 50 percent (control group) with four railroads testing at 25 percent (experimental group). The positive rate for the control group when the study was initiated was 1.1 percent; for the experimental group it was 0.89 percent. In the first year (July 1991 through June 1992), the control group positive rate was 0.90 percent, the experimental group's was 0.87 percent. For the period July 1992 through June 1993, these groups had positive rates of 0.80 percent and 0.94 percent, respectively. During the third year, the experimental rate was 0.86 percent and the control rate was 0.77 percent. The three-year totals were 0.89 percent for the experimentals and 0.82 percent for the controls.

Motor Carriers

The Omnibus Transportation Employee Testing Act of 1991 (P.L. 102–143, Title V, Section 5) required FHWA to conduct a demonstration project to study the feasibility of random roadside alcohol and controlled substances testing. It was partly designed to "serve as a test of, and establish a record on, the effectiveness of state-administered testing in detecting individuals, such as independent owner-operators and independent drivers, who might otherwise avoid detection though the carrier-administered testing directed by the [Omnibus Act]." S. Rep. 102–54, p. 34. The pilot program was administered under the Motor Carrier Safety Assistance Program (MCSAP), which is a federal grant program that assists states in enforcing motor vehicle safety laws and regulations. The pilot program sampled drivers holding commercial drivers licenses operating only on interstate highways and major state roads.

The states of New Jersey, Minnesota, Nebraska, and Utah were selected to participate in the program because they are representative of various geographic and population characteristics. During the course of the year-long study in each state, over 30,000 random drug tests were conducted. Minnesota and New Jersey combined probable cause testing with requests for voluntary urine samples. In some states, drivers could refuse to submit to the drug tests without sanction. The percent positive may also be understated because drivers could have avoided the testing site if they were aware of the testing through communications on CB radios or other informal information networks. The results were as follows:

Random Drug Testing Results In Four Pilot Program States

Drug Testing	NE	UT	MN	NJ	Total
Specimens Evaluated	7,496	10,131	5,729	7,556	30,912

FHWA conducted a one-time special field study of compliance reports. In general compliance investigations of 4,967 interstate motor carrier drug testing programs in the first six months of FY 1993, 28,250 random tests were conducted. There were 878 verified positive results (3.11 percent). The audits represent less than 2 percent of the motor carriers subject to the FHWA rule. The FHWA selects interstate motor carriers for general safety rule compliance investigations by factors such as a safety rating or prior compliance problem. These compliance investigations do not offer scientific, statistically unbiased sampling methods.

U.S. DOT Employees

In the Department's federal employee testing program, the random testing rate of at least 50 percent was phased-in from 25 percent to 50 percent over the first year of the program and achieved at the end of FY 1988. A testing rate of at least 50 percent was maintained in FY 1989–1991. In FY 1992, the figures include testing over the first five months with a rate of at least 50 percent, followed by seven months of testing with a rate of at least 25 percent. FY 1993 figures reflect a full year of testing at 25 percent. The following table summarizes DOT federal employee random testing data.

	FY88	FY89	FY90	FY91	FY92	FY93
Total Number of Random Tests	5,047	17,926	19,103	18,671	12,454	9,433
Number of Positives	42	92	43	40	39	24
Percent Positive	0.83	0.51	0.23	0.21	0.31	0.25

As noted earlier, the USCG has been conducting random drug tests on its active duty and reserve uniformed personnel. Rather than setting a specific testing rate as a requirement at the beginning of the fiscal year, the USCG conducts the maximum number of tests possible from the funds that are appropriated. The percentage of positive results for random tests in each fiscal year and the approximate testing rate is as follows:

	1987	1988	1989	1990	1991	1992	1993
Percent Positive	1.57%	1.31%	0.68%	0.41%	0.41%	0.78%	0.75%
Testing Rate	120%	95%	95%	95%	85%	85%	80%

The Final Rule

The final rule adopts the NPRM with one change. It provides that the Administrator or the Commandant may lower the minimum random drug testing rate to 25 percent if the industry-wide (e.g., aviation, rail) random positive rate is less than 1.0 percent (including refusals to be tested) for 2 consecutive calendar years while testing at 50 percent. The rate will return to 50 percent if the industry random positive rate is 1.0 percent or higher in any subsequent calendar year. The only change is a one-time adjustment for the two industries that have not yet fully implemented random drug testing. Under this provision, the FTA and/or FHWA Administrators may allow the testing rate for their regulated industry to be lowered based on 1995 and 1996 data from those entities required to report. The FTA Administrator will not have to wait until he has the first 2 years of data from small transit operators and the FHWA Administrator will not have to wait until he has the first two years of data from small intrastate motor carriers and motor coach operations before they can possibly lower the rate as proposed in the NPRM. Many of these decisions mirror the reasoning we used in the final rules concerning alcohol testing that were published on February 15, 1994 (59 FR 7302).

Readers may wish to review the preamble to the alcohol testing rules to supplement their understanding of our actions in this final rule.

We acknowledge that breaking up industries into subgroups may be desirable from the point of view of subgroups with lower positive rates. Nevertheless, after careful consideration, we have chosen not to take this approach for several reasons. It allows us to focus on broad safety issues and keep the focus away from potentially endless splitting and balkanization within the industries. If the Department, for example, divided an industry into large and small operators, a particular large operator with very low positives may ask to be separated or certain categories of employees within one of the groups may ask then to be distinguished.

Breaking industries into different subgroups would have many undesirable consequences. As a practical matter, it would be extremely difficult and costly for DOT to administer and enforce. There would be less pressure on very poorly performing subgroups to improve, especially when the existing industry-wide rate was close to 1.0 percent. There might be greater incentive to cheat, especially if the rates were determined by company or small subgroups. Significantly more employees would fall into more than one category, which would cause unnecessary confusion in ensuring random selection and record-keeping. It would be much harder for consortia to keep track of and ensure the integrity of the data. Finally, it might lead to grouping by demographics.

The Testing Rates

The final rule maintains the initial 50 percent random drug testing rate. We believe that this is the appropriate testing rate for industries that are beginning their testing programs. In order to provide incentive for lowering drug usage in a given industry, the Department will allow the random testing rate to be lowered to 25 percent based on demonstrably low annual positive testing rates. The decision will primarily be based on data submitted to the Department.

Under existing MIS rules, certain employers must submit data for a given calendar year by the following March 15th. The Office of Drug Enforcement and Program Compliance in the Office of the Secretary (OST) and each operating administration will review each industry's data for accuracy and completeness and issue a determination regarding the random test rate within a few months. Because covered entities need some lead time to adjust their procedures, make changes in any contracts, and take other necessary action to adjust to an increase or decrease, the notice will be published in advance of the next calendar year.

We recognize that because the reported positive rate is obtained from data the precision of which is eroded by sampling variance and measurement error, and whose accuracy is diminished by non-response bias, there is a risk that it diverges from the actual positive rate in the population. Each operating administration will be using MIS data collection and sampling methods that address these issues to the extent possible and make sense in the context of its particular industry. Where not all employers are included in the reported data, the operating administration will decide how many covered employers must be required to report or be sampled; this decision will be based on the number of employers (not otherwise required to report) that must be sampled to ensure that the reported data from the sampled employers reliably reflect the data that would have been received if all were required to report. However, the decision on whether the reported data reliably support the conclusion (*e.g.,* an audit of company records shows significant falsification of reports) remains subject to DOT's discretion. If the reported data are not sufficiently reliable, the operating administration will not permit the random rate adjustment to occur.

Each operating administration will publish a notice in the *Federal Register* stating what the random testing rate will be in the following year. Any random rate adjustment will occur at the beginning of the calendar year in order to maintain the integrity of the MIS data. The Department may also use a variety of other tools such as press releases, special mailings, or briefings for key industry and press representatives to disseminate information regarding any rate adjustments.

no matter what rate is used for random testing, the testing programs never achieve zero positives. There always is a constant group of "hard-core" individuals of less than 1.0 percent of the population who are detected positive over a period of time; these individuals are unaffected by deterrence-based testing because of addiction or belief that they can escape detection. Several commenters asked us to raise the level, primarily to make it easier for their industry to qualify for a reduction in the testing rate. We were unpersuaded, however, by these commenters because we believe it is not appropriate to raise the level to ease compliance, would unduly undermine the important safety objectives of the program, and is an appropriate cut-off in light of what we believe are achievable goals.

As mentioned above, many commenters, particularly in the aviation industry, strongly supported a 10 percent testing rate. They noted that the alcohol testing rules provide a three-tier system (50 percent /25 percent /10 percent), and believe that if performance were adequate, an industry, or industry subgroup, should be permitted to test at a 10 percent rate. To the extent that costs are reduced with the number of tests conducted, a 10 percent testing rate would provide important cost savings to the best employers with the smallest drug use problem. On a more intangible level, it would provide a goal for employers. It also would be the most flexible approach.

In the NPRM, we noted our tentative conclusion that a 25 percent random testing rate is the minimum effective rate to ensure deterrence for drug use and to allow at least a modicum of detection. There were a number of comments that stated that merely being subject to random testing provided adequate deterrence and detection. Some employer commenters stated that covered employees were unaware of the specific testing rates and that the employees believed that they could be caught at any time. Others denied that their company or industry had any significant problem and considered any but the most minimal testing a waste of time, money and energy. Others focused on the best way to spend the finite resources that could be devoted to drug use prevention.

As discussed in the NPRM, illegal drug use is different from alcohol misuse and these differences argue for a higher random drug testing rate. Drug usage is often harder to detect based on behavior and physical clues such as breath and body odor, or drug packaging. Alcohol passes through the body relatively quickly, while many drugs stay in the system for days, weeks or even months. Unlike alcohol use, most drug use is illegal and drug testing helps ensure deterrence and detection of even off-duty use.

Considering the vital public interest in protecting the safety of our transportation system and the data that show the deterrent and detection benefits of high random rates for drugs, the Department cannot justify permitting a reduction to 10 percent. Statistically, lowering the rate to 10 percent would result in less representative data since so few employees would be tested. Fewer tests result in less detection. So few tests would be conducted at a 10 percent rate that it might take a long time to notice any adverse effects or trends.

Data Required To Raise or Lower Testing Rate

The Department is requiring two years of data before a potential reduction in the testing rate because we want to make sure that the use of drugs is, in fact, demonstrably low and the data reflect more than a statistical aberration or an unusual year.

On the other hand, if an industry's data indicate a positive rate at or above 1.0 percent in any calendar year, we will raise the testing rate based on only one year's data. Our primary interest is ensuring safety and it is important to take a conservative approach. Under our approach, however, there is up to one years' time lag between a rise in positive test results and an increase in the random testing rate. In extraordinary circumstances that endanger public safety, we may need to take emergency action before the beginning of the calendar year.

if he or she deems it necessary for safety. If the Department's review of the data indicates that it is insufficient to make a determination to lower the random testing rate to 25 percent, we will issue a notice stating that the rate will not be changed until one more year of data has been obtained.

Other Provisions

We are not making any change in the rule to account for the change in the marijuana initial test cutoff levels. The change merely allows for more urine specimens that contain marijuana metabolites to be identified. To the extent that there is minimal drug use in a given industry, this technical change should make little difference. That we will now be more successful in correctly identifying positive samples is no reason to make the DOT drug testing rules more lenient. Improvements in technology that permit us to identify users who previously escaped detection are not a reason for lowering our standards.

The remainder of the proposals in the NPRM drew no public comment and are adopted without change. The final rule provides that if a given covered employee is subject to random drug testing under the drug testing rules of more than one DOT agency, the employee is subject to random drug testing at the percentage rate established for the calendar year by the DOT agency regulating more than 50 percent of the employee's function. Similarly, the final rule provides that if an employer is required to conduct random drug testing under the drug testing rules of more than one DOT agency, the employer may either establish separate pools for random selection, with each pool containing covered employees subject to testing at the same required rate, or establish one pool for testing all covered employees at the highest percentage rate established for the calendar year by any DOT agency to which the employer is subject.

If the employer conducts random testing through a consortium, the number of tests to be conducted may be calculated for each individual employer or may be based on the total number of covered employees subject to random testing by the consortium. In order to ensure deterrence, the dates for administering random tests must be spread reasonably throughout the calendar year .

The final rule contains a number of definitions that mirror the alcohol testing rules. The term ''positive rate'' is defined in the definition section of each operating administration drug rule as, ''the number of positive results for random tests conducted under this part plus the number of refusals of random tests required by this part, divided by the total number of random tests conducted under this part plus the number of refusals of random tests required by this part.'' ''Refuse to submit'' means ''a covered employee [who] fails to provide a urine sample as required by 49 CFR part 40, without a valid medical explanation, after he or she has received notice of the requirement to be tested in accordance with the provisions of this part, or engages in conduct that clearly obstructs the testing process.'' As a practical matter, this means that refusals to take a random drug test count as a positive result and would be added to the total number of random tests conducted for the purpose of calculating the industry positive rate. Since they are treated as if they are positive in terms of most of the rules' consequences, we believe they should be counted in the totals. Moreover, without this approach, the system could be easily abused. For example, employers with high positive rates might have an incentive to subtly communicate that employees who test positive will be fired but employees who refuse to be tested will receive little or no punishment other than facing removal from duty and evaluation. The FAA, FRA and USCG also have other sanctions for refusals.

Adulteration of a urine sample is considered a refusal to test because it constitutes an obstruction of the testing process. As such, adulterated specimens are included in the calculation of the industry positive rate. Administrative or procedural errors during the testing process, such as breaking the container holding the sample, that result in canceled tests are not counted in the totals when calculating the industry random test rate.

collect their drug testing data on a calendar year cycle.

The FAA is adding three definitions and amending a third definition to make the drug testing rule clearer and to parallel the alcohol testing rule. ''Contractor company'' is defined to mean ''a company that has employees who perform safety-sensitive functions by contract for an employer.'' ''DOT agency'' is defined to mean ''an agency (or 'operating administration') of the United States Department of Transportation administering regulations requiring drug testing (14 CFR part 61 *et al.*; 46 CFR part 16; 49 CFR parts 199, 219, and 382) in accordance with 49 CFR part 40.'' The FAA is also adding a provision to clarify current requirements concerning access to records. The provision provides that an employer required to conduct random drug testing under the anti drug rules of more than one DOT agency shall provide each such agency access to the employer's records of random drug testing, as determined to be necessary by the agency to ensure the employer's compliance with the rule. This provision is designed to resolve some confusion regarding compliance monitoring of multi-modal pools.

Implementation Dates

Based on the 1992–1993 data submitted to FRA and FAA, the railroad and aviation industries may begin testing at a minimum 25 percent random rate beginning January 1, 1995, because their positive rates were less than 1.0 percent in 1992 and 1993. Pipeline and marine employers will continue testing at 50 percent until they have 2 years of data showing that random positive rates for their industries are less than 1.0 percent. If the positive rates are below 1.0 percent for 1994 and 1995, then testing rates may be lowered to 25 percent beginning January 1, 1997.

Interstate motor carriers are currently testing at a minimum 50 percent testing rate and will continue to do so until the positive rate for the entire motor carrier industry (both interstate and intrastate and motor coach operations) is less than 1.0 percent. Large intrastate motor carriers will begin random drug testing at a minimum 50 percent testing rate on January 1, 1995, and small intrastate motor carriers will begin random testing at a 50 percent rate on January 1, 1996. We will allow the motor carrier industry to reduce its testing rate to 25 percent beginning on January 1, 1998, if the 1995 and 1996 data for those required to conduct random testing under the FHWA rule demonstrate a positive rate of less than 1.0 percent.

Large transit operators will begin random drug testing at a minimum 50 percent testing rate on January 1, 1995, and small transit operators will begin random testing at a 50 percent rate on January 1, 1996. If the 1995 and 1996 data for large transit operators combined with the 1996 data for small transit operators demonstrate a positive rate of less than 1.0 percent, we will allow the transit industry to reduce its testing rates to 25 percent beginning on January 1, 1998. Industries that do not meet the criterion will continue to test at a minimum 50 percent random testing rate.

Regulatory Analyses and Notices

DOT Regulatory Policies and Procedures

The final rule is considered to be a significant rulemaking under DOT Regulatory Policies and Procedures, 44 FR 11034, because of the substantial public and Congressional interest in this subject. A regulatory evaluation has been prepared and is available for review in the OST docket. This final rule was reviewed by the Office of Information and Regulatory Affairs pursuant to Executive Order 12866.

FAA estimates an average potential cost savings of approximately $9 million per year for the aviation industry if the testing rate is dropped to 25 percent. USCG estimates an annual cost savings of between $0.8 million to $1.6 million annually for maritime; RSPA estimates $1.4 million or more per year for pipelines; FRA estimates $1 million per year for the railroad industry; FHWA estimates $107 million per year or more for motor carriers; and FTA estimates an average of $7 million per year or more

is difficult to project which other transportation industries are likely to qualify for a reduction in the testing rate. The remaining transportation industries (motor carriers, pipelines, maritime, and transit) include many small companies. If the random testing rate were reduced in any of those industries, there might be a significant cost savings, as discussed in the accompanying regulatory evaluation. In addition, to the extent that the rate is lowered it might have a negative economic impact on those who provide services to employers covered under the rules, some of whom are small entities. Under the best circumstances, however, motor carriers, transit and pipeline industries could not reduce their testing rates until 1998. We therefore certify that this rule will not have a significant economic impact on a substantial number of small entities for at least the next several years.

Paperwork Reduction Act

There are a number of reporting or recordkeeping requirements associated with DOT-mandated drug testing. Some of the requirements are currently part of the OAs' drug testing rules and some have been incorporated as a result of the final rules setting up the management information systems that were published in the *Federal Register* on December 23, 1993. To the extent that fewer random tests are required in a given transportation industry, there will be a proportionate reduction in recordkeeping, but no change in the reporting requirement.

For the reasons set out in the preamble, the Federal Aviation Administration amends 14 CFR part 121 effective January 1, 1995.

The authority citation for part 121 is revised to read as follows:

Authority: 49 U.S.C. 106(g), 1354(a), 1355, 1356, 1357, 1401, 1421–1430, 1485, and 1502.

Amendment 121–245

Alcohol Misuse Prevention Program

Adopted: November 22, 1994 **Effective: January 1, 1995**

(Published in 59 FR 62234, December 2, 1994)

SUMMARY: On February 15, 1994, the Department of Transportation published final alcohol testing rules, including a requirement that evidential breath testing devices be used to conduct alcohol tests. The Department also published a notice of proposed rulemaking seeking comment on whether blood testing should be used in very limited circumstances (i.e., for reasonable suspicion and post-accident tests, where evidential breath testing was not available). After reviewing the comments, the Department has decided not to authorize blood testing as proposed. The Department's operating administrations are amending their alcohol testing rules to require employers to submit to the Department reports of reasonable suspicion and post-accident tests that could not be conducted because breath testing was unavailable.

DATES: The amendments to the FAA, RSPA, FRA, FHWA, and FTA alcohol testing regulations are effective January 1, 1995. Comments concerning the reporting requirement added to the five operating administration alcohol testing regulations should be received by January 17, 1995. Late filed comments will be considered to the extent practicable.

ADDRESSES: Comments should be sent to Docket Clerk, Docket No. 49384, Room 4107, Department of Transportation, 400 7th Street, SW., Washington DC, 20590. This is a consolidated docket that will accept comments on the amendments to all five operating administration rules involved. Commenters

date, including acquisition of equipment and training of personnel. No postponements of this compliance date have been granted. Since employers will have been on notice of this compliance date since February 15, 1994, the Department believes that employers will have had a reasonable time to prepare.

The NPRM

When the Department proposed the alcohol testing rules that it adopted in February 1994, one of the most important, most frequently commented-upon issues was the choice of testing methodology. After carefully considering comments about a variety of methods and devices, including arguments concerning the degree of discretion employers should have in choosing a testing method, the Department decided that the use of evidential breath testing devices (EBTs) was the most appropriate approach to take. The Department discussed the reasons for this decision at some length in the preamble to its alcohol testing procedures rule. See 59 FR 7342–7347; February 15, 1994.

At the same time, the Department sought comments, through a notice of proposed rulemaking (NPRM), on whether the Department should authorize blood testing for alcohol to be used in certain specific, very limited circumstances. See 59 FR 7367–7371; February 15, 1994. Under the proposal, blood would be used "only in those reasonable suspicion and post-accident testing circumstances where it is not practicable to use breath testing." *Id.* at 7367. The Department specifically noted that blood testing was "not intended, under the proposal, to be an equal alternative method that an employer can choose as a matter of preference." *Id.* The NPRM did not propose re-opening the underlying decision that breath testing is to be the basic testing method under the rules.

The rationale for the proposal was that "in some circumstances, the unavailability of EBTs * * * may make breath testing impracticable." *Id.* The Department noted that

[R]easonable suspicion and post-accident tests are more likely than other kinds of tests to happen at unpredictable times and in remote locations * * * [I]t may be substantially easier and less costly to arrange for a blood alcohol test [than a breath test] in these circumstances. In some cases, it may be impossible to get an EBT to a remote location in time to conduct a meaningful test. *Id.*

Under such circumstances, the NPRM said, it might be better to test using blood, despite its known disadvantages (which the preambles to both the part 40 final rule and the NPRM spelled out), than to be unable to complete a reasonable suspicion or post-accident test. The NPRM noted that there would probably be a small number of such tests per year (roughly estimated at 2500 per year), which could mitigate the effect of these disadvantages.

The remainder of the NPRM proposed procedures that would be used in the event the Department adopted the proposal. These proposals addressed such subjects as collection procedures, qualification of testing personnel, laboratories and laboratory procedures, and "fatal flaws" that would invalidate tests.

Comments

The Department received 185 comments on this NPRM. The commenters included 15 transportation employers or their associations, 9 testing industry organizations, 6 unions, and 155 individual transportation employees. Several months after the close of the comment period, the Department received additional correspondence on this subject, but the comments arrived so late in the rulemaking process that it was not practicable to consider them.

Comment was divided on the basic issue of whether blood testing should be authorized. Employee comments were uniformly against the proposal. Six unions representing transportation workers and 155 individual transportation employees opposed blood testing. They cited a number of reasons. Blood testing was too invasive, causing pain and fear in many employees and severely invading employees' privacy. There was no possibility of immediate confirmation. There would be too much employer discretion as

or used. Employers in the pipeline industry were particularly in favor of this approach, noting that only reasonable suspicion and post-accident alcohol tests are required for their industry, which has employees at many remote sites.

A related issue was how to define "readily available." The NPRM proposed that blood could be used when breath testing was not "readily available," and asked for comment on what that term should mean. Five commenters believed that a specific number of hours (e.g., two or eight) should be used as the criterion. That is, if breath testing could not be performed within that number of hours after the event leading to the test, then blood could be used. Nine commenters, to the contrary, said that employers should be able to decide when breath testing was readily available, based on such factors as cost, convenience, or preference. (One comment, on the other hand, said employers should never have this discretion.) The latter view was advocated by several of the commenters who favored a broader use of blood testing than the NPRM proposed, as it would reduce the number of occasions on which breath testing would be needed and perhaps make it possible for some employers to avoid breath testing altogether. Two commenters, representing aviation management and labor, respectively, disagreed about whether EBTs would typically be available in airports. Two other commenters proposed more complex schemes for determining when blood testing could be used.

On the question of what laboratories should be used for blood testing, six comments favored using state-certified laboratories, when they were available. Some of them said that these laboratories should be viewed as adequate at least until Department of Health and Human Services (DHHS) -certified laboratories became available. Ten comments favored DHHS certification for blood testing laboratories, though these commenters differed among themselves about whether DHHS-certified laboratories should be the only laboratories permitted to test blood in DOT-mandated tests. Two other comments favored using laboratories certified by the College of American Pathologists (CAP), and three others supported using whatever laboratories were available, whether certified by DHHS, states, or CAP.

Eleven commenters thought DOT should develop uniform, national testing procedures. Some of these commenters argued that state procedures are unreliable or that it would be too confusing to apply a variety of state standards, particularly for employers who operate in more than one state. Two testing industry organizations suggested using an existing industry blood collection standard. Eight other commenters thought that state procedures, or procedures developed at the discretion of the employer, should be viewed as adequate.

Nine commenters thought employers should either be authorized or required to "stand down" employees based on a positive screening test, pending receipt of the results of the blood confirmation test from the laboratory. Eight comments favored allowing an employee's supervisor to act as the collector for the screening test, the confirmation test, or both, at least if other trained collectors were not available. One comment opposed ever allowing a supervisor to act as a collector. With respect to fatal flaws, nine commenters agreed (and two disagreed) that a sample collected by an unauthorized collector should be regarded as invalid, eight said it should not be a fatal flaw if the procedures of the wrong state were used for collection. There were also several comments concerning the details of blood testing kits.

DOT Response

The Department clearly and specifically limited the NPRM to consideration of whether blood testing should be used for situations in which breath testing was not readily available for reasonable suspicion and post-accident tests, or in "shy lung" situations. For this reason, the issue raised by some commenters of whether employers should have the flexibility or discretion to use blood testing as an alternative to breath testing, even when breath testing is readily available in reasonable suspicion and post-accident testing or even in random or pre-employment testing, is outside the scope of the rulemaking.

the greater invasiveness of this approach would, on the whole, make employee acceptance of the program more, rather than less, difficult to obtain. Employee acceptance is one factor that leads to the success of an alcohol misuse prevention program.

Another factor we have taken into consideration is the added program complexity that would result from including blood testing in the Department's programs. Laboratories would have to be certified to test the blood samples. As the division among commenters on this point demonstrates, the best solution to this problem is not clear. In our view, DHHS certification would be the highest standard for accuracy and reliability of testing. However, there would be considerable costs to laboratories and the Department, as well as some delays in program implementation, if DHHS had to create a laboratory certification program for blood alcohol testing, as it has for urine drug testing. Assuming that the number of tests involved is small (see discussion below) it might well not be cost effective for laboratories to go through a DHHS certification process. State-certified laboratories appear to vary in reputation for quality as well as in terms of availability; not all states have state or state-certified laboratories that would accept specimens for purposes of DOT-mandated testing.

As mentioned in the preamble of the NPRM, the Department has expressly declined to use laboratories certified by private organizations (such as the CAP) in the drug testing context, and the comments did not provide a persuasive rationale for taking a different course with respect to alcohol testing. Using state or privately certified laboratories as an interim measure until DHHS-certified laboratories are ready could create concern among employees and employers about ensuring the highest level of accuracy in the program. The other procedural issues discussed in the comments—DOT national uniform procedures vs. reliance on differing state procedures, whether there should be a standard DOT blood testing kit and what should be in it, what should constitute a fatal flaw, etc.—also suggest that it would be a very complex matter to devise an appropriate set of procedures for blood testing.

Other questions arise because of the relationship of non-evidential screening test devices and blood tests. For example, suppose a saliva screening device indicates that an employee tests positive for alcohol. The blood test result will not be available from the laboratory for two or three days. What happens to the employee in the meantime? This is a problem we do not face with evidential breath testing, since a confirmation test result is available immediately, a point which we view as a significant advantage of breath testing.

In the drug testing rules, we explicitly prohibit on-site testing, in part for the reason that we consider it inappropriate for an employer to take any action against an employee, absent a confirmed and verified positive test result. (Concern about the accuracy of devices was also involved in this decision.) A similar situation would occur if an employee had a positive on-site screening test for alcohol and the employer stood him or her down pending receipt of the laboratory confirmation test result. On the other hand, from a safety point of view, there is much to recommend to employers that they stand an employee down after a positive on-site screening test, since no one wants to send (for example) a truck driver back onto the road when we have a test result suggesting that the driver may have alcohol in his or her system. The comments on the subject favored standing employees down in this situation.

Should the Department, contrary to the drug testing rules, permit or require the employer to stand an employee down in this situation? If the employer stands an employee down in this situation, should DOT rules mandate that the employer pay the employee for the "stand down" period? In any case? Only if the confirmation test is negative? These are difficult and troubling questions, to which the best answers are far from self-evident.

This is not to say that the issues of invasiveness, added procedural complexity, and stand-down are incapable of resolution. But is it worthwhile, from the point of view of employers, employees, and the Department, to create a new component of the alcohol testing program carrying these problems with it? The basic rationale for adding blood testing to the program is that, in its absence, employers will

medical treatment away from the scene results in a post-accident test) mean that only a small percentage of all motor carrier accidents are likely to result in post-accident tests. The nature of drivers' jobs, which do not involve frequent or long-term observation by supervisors, suggests that there will be relatively few occasions for reasonable suspicion tests. The pipeline industry, in which most accidents happen because of non-pipeline employees damaging pipelines (e.g., construction crews digging into a pipeline), and in which employees may often operate in remote locations with little supervision, appears to share this relatively low probability of reasonable suspicion and post-accident testing. We also anticipate few ''shy lung'' situations, and part 40 has a provision to deal with them.

Other industries, which involve closer supervision of employees and/or broader definitions of triggering accidents may produce somewhat greater rates of post-accident or reasonable suspicion test situations. (In one of these, the railroad industry, post-accident blood testing is done by FRA under a long-standing rule using an FRA contract lab. Nothing in this today's action in any way changes FRA's existing requirements involving blood testing.) However, since the absolute numbers of employees in these industries are much smaller, they will have less of an effect on the total number of such occasions. Even in these industries, the numbers may not be very high. Data from the aviation industry, for example, suggests that there have been relatively few post-accident or reasonable cause drug tests (e.g., 720 out of 268,809 total tests conducted in 1993 under the FAA rule).

This brings us to the next factor. What data we have from situations where reasonable suspicion/ cause tests have been administered for both drugs and alcohol suggests that there may be substantially fewer such tests for alcohol than for drugs. For example, recent railroad industry data suggest that of the total of such tests, alcohol tests made up only about 17 percent of the total.

Finally, we expect that a substantial percentage of the reasonable suspicion and post-accident testing situations can be ''caught'' by breath testing. This is particularly true in those industries (e.g., the railroad, transit, and aviation industries) where employees perform most safety-sensitive duties on known routes or in known locations, and where supervision is more readily available. Even in the motor carrier industry, the provision in the FHWA rule that allows use for purposes of the DOT testing program of results of tests conducted by law enforcement can help to reduce the incidence of ''missed'' tests.

However, there are likely to be some situations in which *no testing method*—including blood—can be brought to bear in time to conduct a post-accident or reasonable suspicion test. The oft-mentioned example of a truck accident at 2 a.m. on a remote highway in the middle of the desert may well be an example of a situation in which blood, as well as breath, testing will not be available in a timely manner. Certainly it would be a doubtful assumption that all, or perhaps even a majority, of tests that would be ''missed'' with breath would be ''caught'' with blood.

Consequently, if we added blood testing to the alcohol testing program as proposed in the NPRM, we would be incurring the disadvantages of such a step in order to catch a subset of a subset of the universe of all reasonable suspicion and post-accident alcohol tests required under the Department's rules. This universe itself will probably not be a large one. Many of the tests can be caught by breath testing. Of those that cannot, many could not be caught by blood testing either.

In the NPRM, we made a rough estimate of perhaps 2500 situations per year in which blood would catch a test that breath could not. Commenters did not present data suggesting that the number would be significantly higher; we tend to think, at this time, that the estimate may have been too high.

We have concluded that it is not worth subjecting employees to an invasive testing procedure and incurring the other disadvantages of adding blood alcohol testing to our program to capture this probably small number of cases. For this reason, we are withdrawing the proposed authorization of the use of blood in some post-accident and reasonable suspicion test situations, and we will not include blood

issued by the operating administrations on February 15, 1994, tell employers to discontinue attempts at testing after eight hours but require them to keep a record explaining the inability to conduct the test.

Consortia and third-party service providers can often provide both more economical service and wider coverage than employers would find possible on their own. Reimbursable agreements among employers, even across various industries, could make EBT and BAT services available in locations where a single employer would not have coverage. The operating administrations will also provide guidance and work with their employers to ensure appropriate coverage by employers. Finally, the Department recognizes that there will be some situations in which the best good faith efforts on the part of an employer (as distinct from an abdication of the effort) cannot result in a test being completed. That is, we acknowledge and accept the fact that there will be some ''missed'' tests.

The Department's judgment on this issue is based, to a considerable extent, on the premise that there will not be excessive numbers of ''missed'' tests. This premise, while based on a logical view of how our program will work, is not, at this stage, based on hard data. This is because the alcohol testing program has not begun yet, so there is little data on which we can rely. (That is, the first MIS reports for alcohol are not due until March 15, 1996. The first MIS reports for drugs are not due until March 15, 1995, so we do not even have comprehensive data yet for drug testing in most of the affected industries which might serve as a basis for inferences about the alcohol testing program.) For this reason, the Department is modifying an existing regulatory requirement to generate relevant data.

All the operating administration alcohol testing regulations include a requirement for employers to prepare and maintain on file a record of when a post-accident or reasonable suspicion test is not administered within eight hours. At this point, the employer must stop attempts to administer the test. This is, in other words, an existing requirement to document a ''missed'' test and the reasons for it. This requirement applies to all covered employers.

For a three-year period beginning January 1, 1995, the Department will require those employers who transmit an MIS report to the Department to transmit a copy of these records along with their MIS report. They should be sent to the same address as MIS reports are sent for the operating administration involved. Reports should be sent to the operating administration *only* at the time that MIS reports are sent. That is, the employer should send a year's worth of reports (a separate report for each ''missed test'') to the operating administration at one time. Employers should not send reports concerning tests which are conducted within the 8-hour period, only concerning tests that are not conducted because more than 8 hours have passed since the triggering event. (The existing rules also require employers to document when a reasonable suspicion or post-accident test cannot be conducted within two hours. This requirement remains in effect, but employers are not required to report to DOT concerning tests that are conducted more than two but less than eight hours after the triggering event. This is because such tests, while perhaps of diminished value, are not truly ''missed tests.'')

The rule specifies the information that would be part of the records. The required information is the following:

(1) *Type of test.* Is the test a reasonable suspicion or post-accident test? (This information is not required from railroad employers, since FRA has always conducted post-accident blood tests and does not conduct post-accident breath alcohol testing parallel to that conducted under other operating administrations' rules. All ''missed tests'' under the FRA rule would be reasonable suspicion tests.)

(2) *Triggering event.* What was the date, time and location of the accident or supervisor's determination of reasonable suspicion that led to the requirement for the test?

which blood testing could have occurred. (This information will help the Department to estimate the frequency of situations in which blood testing would have been available where breath testing is not.)

The Department will analyze these reports (which, since they concern 1995, 1996, and 1997, will include three years' data for large employers and two years' data for small employers) in 1998. We will revisit, at that time, the issue of whether there are sufficient numbers of post-accident and reasonable suspicion testing occasions which are missed by breath testing and could be captured by blood testing to make the addition of blood testing (or some other, new technology) a worthwhile step. While this data collection requirement is a response to the issues raised by the NPRM, and is a logical outgrowth of our consideration of those issues and the comments on them, it was not itself specifically proposed in that document. Therefore, we are asking for comment on the reporting requirement. Because we believe it is important to be in a position to have responded to comments on the reporting requirement before January 1, 1995, when alcohol testing begins and records of missed tests would need to start being kept for the reports that are due March 15, 1996, we have established a 45-day, rather than a 60-day, comment period on the reporting requirement. This opportunity for comment concerns only the reporting requirement itself, and not the underlying decision to withdraw the proposal to allow blood testing. Comments on that decision will be considered as outside the scope of this request for comments.

Regulatory Analyses and Notices

The Department has determined that this rule is a significant rule for purposes of Executive Order 12886 and the Department's Regulatory Policies and Procedures. While it makes only small changes to the Department's existing alcohol testing requirements, it pertains to a Department-wide regulatory program, and has been reviewed by all concerned Departmental offices and the Office of Management and Budget (OMB). The costs and benefits of alcohol testing were fully analyzed as part of the final rules issued February 15, 1994. Because the rule does impose a new reporting requirement, we have submitted this requirement to OMB for review under the Paperwork Reduction Act. The new reporting requirement will not be effective until OMB has approved it. DOT will publish a *Federal Register* notice when OMB approves the requirement.

Under the Regulatory Flexibility Act, the Department certifies that the requirements imposed by this rule will not have a significant economic effect on a substantial number of small entities. There are not sufficient Federalism impacts to warrant a Federalism assessment under Executive Order 12612.

For the reasons set forth in the preamble, the Department of Transportation amends 14 CFR part 121, 49 CFR part 199, 49 CFR part 219, 49 CFR part 382, and 49 CFR part 654 effective January 1, 1995.

The authority citation for part 121 is revised to read as follows:

Authority: 49 U.S.C. 106(g), 1354(a), 1355, 1356, 1357, 1401, 1421–1430, 1485, and 1502.

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nents that must be included in an anti-drug program required by this chapter.

I. *DOT Procedures.* Each employer shall ensure that drug testing programs conducted pursuant to 14 CFR parts 65, 121, and 135 [comply]* with the requirements of this appendix and the "Procedures for Transportation Workplace Drug Testing Programs" published by the Department of Transportation (DOT) (49 CFR part 40). An employer may not use or contract with any drug testing laboratory that is not certified by the Department of Health and Human Services (DHHS) pursuant to the DHHS "Mandatory Guidelines for Federal Workplace Drug Testing Programs" (53 FR 11970; April 11, 1988 as amended by 59 FR 29908; June 9, 1994).

II. *Definitions.* For the purpose of this appendix, the following definitions apply:

Accident means an occurrence associated with the operation of an aircraft which takes place between the time any person boards the aircraft with the intention of flight and all such persons have disembarked, and in which any person suffers death or serious injury, or in which the aircraft receives substantial damage.

Annualized rate for the purposes of unannounced testing of employees based on random selection means the percentage of specimen collection and testing of employees performing a safety-sensitive function during a calendar year. The employer shall determine the annualized rate by referring to the total number of employees performing a safety-sensitive function for the employer at the beginning of the calendar year.

[*Contractor company* means a company that has employees who perform safety-sensitive functions by contract for an employer.]

[*DOT agency* means an agency (or "operating administration") of the United States Department of Transportation administering regulations requiring drug testing (14 CFR part 61 et al.; 46 CFR part 16; 49 CFR parts 199, 219, and 382) in accordance with 49 CFR part 40.]

Employee is a person who performs, either directly or by contract, a safety-sensitive function ever, that an employee who works for an employer who holds a part 135 certificate and who holds a part 121 certificate is considered to be an employee of the part 121 certificate holder for the purposes of this appendix.

Employer is a part 121 certificate holder, a part 135 certificate holder, an operator as defined in § 135.1(c) of this chapter, or an air traffic control facility not operated by the FAA or by or under contract to the U.S. military. Provided, however, that an employer may use a person who is not included under that employer's drug program to perform a safety-sensitive function, if that person is subject to the requirements of another employer's FAA-approved antidrug program.

Performing (a safety-sensitive function): an employee is considered to be performing a safety-sensitive function during any period in which he or she is actually performing, ready to perform, or immediately available to perform such function.

[*Positive rate* means the number of positive results for random drug tests conducted under this appendix plus the number of refusals to take random tests required by this appendix, divided by the total number of random drug tests conducted under this appendix plus the number of refusals to take random tests required by this appendix.]

Prohibited drug means marijuana, cocaine, opiates, phencyclidine (PCP), amphetamines, or a substance specified in Schedule I or Schedule II of the Controlled Substances Act, 21 U.S.C. 811, 812, unless the drug is being used as authorized by a legal prescription or other exemption under Federal, state, or local law.

[*Refusal to submit* means that an individual failed to provide a urine sample as required by 49 CFR part 40, without a genuine inability to provide a specimen (as determined by a medical evaluation), after he or she has received notice of the requirement to be tested in accordance with this appendix, or engaged in conduct that clearly obstructed the testing process.]

Safety-sensitive function means a function listed in section III of this appendix.

under this appendix has been verified by a Medical Review Officer as negative in accordance with 49 CFR part 40.

Verified positive drug test result means that the test result of a urine sample collected and tested under this appendix has been verified by a Medical Review Officer as positive in accordance with 49 CFR part 40.

III. *Employees Who Must Be Tested.* Each person who performs a safety-sensitive function directly or by contract for an employer must be tested pursuant to an FAA-approved antidrug program conducted in accordance with this appendix:

A. Flight crewmember duties.

B. Flight attendant duties.

C. Flight instruction duties.

D. Aircraft dispatcher duties.

E. Aircraft maintenance or preventive maintenance duties.

F. Ground security coordinator duties.

G. Aviation screening duties.

H. Air traffic control duties.

IV. *Substances for Which Testing Must Be Conducted.* Each employer shall test each employee who performs a safety-sensitive function for evidence of marijuana, cocaine, opiates, phencyclidine (PCP), and amphetamines during each test required by section V of this appendix. As part of a reasonable cause drug testing program established pursuant to this part, employers may test for drugs in addition to those specified in this part only with approval granted by the FAA under 49 CFR part 40 and for substances for which the Department of Health and Human Services has established an approved testing protocol and positive threshold.

V. *Types of Drug Testing Required.* Each employer shall conduct the following types of testing in accordance with the procedures set forth in this appendix and the DOT ''Procedures for Transportation Workplace Drug Testing Programs'' (49 CFR part 40):

A. *Pre-employment Testing.*

conducted under this appendix for reasons other than a verified positive test result on an FAA-mandated drug test or a refusal to submit to such testing; and

(c) The individual will be returning to the performance of a safety-sensitive function.

3. No employer shall allow an individual required to undergo pre-employment testing under section V, paragraphs A.1 or A.2 of this appendix to perform a safety-sensitive function unless the employer has received a verified negative drug test result for the individual.

4. The employer shall advise each individual applying to perform a safety-sensitive function at the time of application that the individual will be required to undergo pre-employment testing to determine the presence of marijuana, cocaine, opiates, phencyclidine (PCP), and amphetamines, or a metabolite of those drugs in the individual's system. The employer shall provide this same notification to each individual required by the employer to undergo pre-employment testing under section V, paragraph A.(2) of this appendix.

B. *Periodic Testing.* Each employee who performs a safety-sensitive function for an employer and who is required to undergo a medical examination under part 67 of this chapter shall submit to a periodic drug test. The employee shall be tested for the presence of marijuana, cocaine, opiates, phencyclidine (PCP), and amphetamines, or a metabolite of those drugs during the first calendar year of implementation of the employer's antidrug program. The tests shall be conducted in conjunction with the first medical evaluation of the employee or in accordance with an alternative method for collecting periodic test specimens detailed in an employer's approved antidrug program. An employer may discontinue periodic testing of its employees after the first calendar year of implementation of the employer's antidrug program when the employer has implemented an unannounced testing program based on random selection of employees.

this appendix. In order to ensure reliability of the data, the Administrator considers the quality and completeness of the reported data, may obtain additional information or reports from employers, and may make appropriate modifications in calculating the industry positive rate. Each year, the Administrator will publish in the *Federal Register* the minimum annual percentage rate for random drug testing of covered employees. The new minimum annual percentage rate for random drug testing will be applicable starting January 1 of the calendar year following publication.

3. When the minimum annual percentage rate for random drug testing is 50 percent, the Administrator may lower this rate to 25 percent of all covered employees if the Administrator determines that the data received under the reporting requirements of this appendix for two consecutive calendar years indicate that the reported positive rate is less than 1.0 percent.

4. When the minimum annual percentage rate for random drug testing is 25 percent, and the data received under the reporting requirements of this appendix for any calendar year indicate that the reported positive rate is equal to or greater than 1.0 percent, the Administrator will increase the minimum annual percentage rate for random drug testing to 50 percent of all covered employees.

5. The selection of employees for random drug testing shall be made by a scientifically valid method, such as a random-number table or a computer-based random number generator that is matched with employees' Social Security numbers, payroll identification numbers, or other comparable identifying numbers. Under the selection process used, each covered employee shall have an equal chance of being tested each time selections are made.

6. The employer shall randomly select a sufficient number of covered employees for testing during each calendar year to equal an annual rate not less than the minimum annual percentage drug tests conducted under this appendix are unannounced and that the dates for administering random tests are spread reasonably throughout the calendar year.

8. If a given covered employee is subject to random drug testing under the drug testing rules of more than one DOT agency, the employee shall be subject to random drug testing at the percentage rate established for the calendar year by the DOT agency regulating more than 50 percent of the employee's function.

9. If an employer is required to conduct random drug testing under the drug testing rules of more than one DOT agency, the employer may—

(a) Establish separate pools for random selection, with each pool containing the covered employees who are subject to testing at the same required rate; or

(b) Randomly select covered employees for testing at the highest percentage rate established for the calendar year by any DOT agency to which the employer is subject.

10. An employer required to conduct random drug testing under the anti drug rules of more than one DOT agency shall provide each such agency access to the employer's records of random drug testing, as determined to be necessary by the agency to ensure the employer's compliance with the rule.]

D. *Post-accident Testing.* Each employer shall test each employee who performs a safety-sensitive function for the presence of marijuana, cocaine, opiates, phencyclidine (PCP), and amphetamines, or a metabolite of those drugs in the employee's system if that employee's performance either contributed to an accident or can not be completely discounted as a contributing factor to the accident. The employee shall be tested as soon as possible but not later than 32 hours after the accident. The decision not to administer a test under this section must be based on a determination, using the best information available at the time of the determination, that the employee's performance could not

an employee's specimen for the presence of other prohibited drugs or drug metabolites only in accordance with this appendix and the DOT "Procedures for Transportation Workplace Drug Testing Programs" (49 CFR part 40). At least two of the employee's supervisors, one of whom is trained in detection of the symptoms of possible drug use, shall substantiate and concur in the decision to test an employee who is reasonably suspected of drug use; provided, however, that in the case of an employer other than a part 121 certificate holder who employs 50 or fewer employees who perform safety-sensitive functions, one supervisor who is trained in detection of symptoms of possible drug use shall substantiate the decision to test an employee who is reasonably suspected of drug use. The decision to test must be based on a reasonable and articulable belief that the employee is using a prohibited drug on the basis of specific contemporaneous physical, behavioral, or performance indicators of probable drug use.

F. *Return to Duty Testing.* Each employer shall ensure that before an individual is returned to duty to perform a safety-sensitive function after refusing to submit to a drug test required by this appendix or receiving a verified positive drug test result on a test conducted under this appendix the individual shall undergo a drug test. No employer shall allow an individual required to undergo return to duty testing to perform a safety-sensitive function unless the employer has received a verified negative drug test result for the individual.

G. *Follow-up Testing.*

1. Each employer shall implement a reasonable program of unannounced testing of each individual who has been hired to perform or who has been returned to the performance of a safety-sensitive function after refusing to submit to a drug test required by this appendix or receiving a verified positive drug test result on a test conducted under this appendix.

2. The number and frequency of such testing shall be determined by the employer's Medical Review Officer. In the case of any individual ducted in accordance with the provisions of 49 CFR part 40.

4. Follow-up testing shall not exceed 60 months after the date the individual begins to perform or returns to the performance of a safety-sensitive function. The Medical Review Officer may terminate the requirement for follow-up testing at any time after the first six tests have been conducted, if the Medical Review Officer determines that such testing is no longer necessary.

VI. *Administrative and Other Matters*

A. *Collection, Testing, and Rehabilitation Records.* Each employer shall maintain all records related to the collection process, including all logbooks and certification statements, for two years. Each employer shall maintain records of employee confirmed positive drug test results, SAP evaluations, and employee rehabilitation for five years. The employer shall maintain records of negative test results for 12 months. The employer shall permit the Administrator or the Administrator's representative to examine these records.

B. *Laboratory Inspections.* The employer shall contract only with a laboratory that permits preaward inspections by the employer before the laboratory is awarded a testing contract and unannounced inspections, including examination of any and all records at any time by the employer, the Administrator, or the Administrator's representative.

C. *Employee Request for Test of a Split Specimen.*

1. Not later than 72 hours after receipt of notice of a verified positive test result, an employee may request that the MRO arrange for testing of the second, "split" specimen obtained during the collection of the primary specimen that resulted in the confirmed positive test result.

2. The split specimen shall be tested in accordance with the procedures in 49 CFR part 40.

3. The MRO shall not delay verification of the primary test result following a request for a split specimen test unless such delay is based on reasons other than the pendency of the split

authorizing release of the information to an identified person, to the National Transportation Safety Board as part of an accident investigation upon written request or order, to the FAA upon request, or as required by this appendix. Except as required by law or this appendix, no employer shall release employee information.

E. *Refusal To Submit to Testing.*

1. Each employer shall notify the FAA within 5 working days of any employee who holds a certificate issued under part 61, part 63, or part 65 of this chapter who has refused to submit to a drug test required under this appendix. Notification should be sent to: Federal Aviation Administration, Aviation Standards National Field Office, Airmen Certification Branch, AVN–460, P.O. Box 25082, Oklahoma City, OK 73125.

2. Employers are not required to notify the above office of refusals to submit to pre-employment or return to duty testing.

F. *Permanent Disqualification From Service.*

1. An employee who has verified positive drug test results on two drug tests required by appendix I to part 121 of this chapter and conducted after September 19, 1994 is permanently precluded from performing for an employer the safety-sensitive duties the employee performed prior to the second drug test.

2. An employee who has engaged in prohibited drug use during the performance of a safety-sensitive function after September 19, 1994 is permanently precluded from performing that safety-sensitive function for an employer.

VII. *Medical Review Officer/Substance Abuse Professional.* The employer shall designate or appoint a Medical Review Officer (MRO) who shall be qualified in accordance with 49 CFR part 40 and shall perform the functions set forth in 49 CFR part 40 and this appendix. If the employer does not have a qualified individual on staff to serve as MRO, the employer may contract for the provision of MRO services as part of its drug testing program.

cate in order to perform the duties of the position for which the applicant is applying.

2. The MRO must process employee requests for testing of split specimens in accordance with section VI, paragraph C, of this appendix.

3. The MRO shall advise each employee who receives a verified positive drug test result on or refuses to submit to a drug test required under this appendix of the resources available to the employee in evaluating and resolving problems associated with illegal use of drugs, including the names, addresses, and telephone numbers of substance abuse professionals (SAP) and counseling and treatment programs.

4. The MRO shall ensure that each employee who receives a verified positive drug test result on or refuses to submit to a drug test required under this appendix is evaluated by a SAP to determine if the employee is in need of assistance in resolving problems associated with illegal use of drugs. The MRO may perform this evaluation if the MRO is qualified as a SAP.

5. Prior to recommending that an employee be returned to the performance of a safety-sensitive function after the employee has received a verified positive drug test result on or refused to submit to a drug test required by this appendix, the MRO shall—

a. Ensure that an employee returning to the performance of a safety-sensitive function has received a return to duty verified negative drug test result on a test conducted under section V., paragraph F of this appendix;

b. Ensure that each employee has been evaluated in accordance with section VII, paragraph A.4 of this appendix; and–

c. Ensure that the employee demonstrates compliance with any rehabilitation program recommended following the evaluation required under section VII, paragraph A.4 of this appendix.

6. Prior to recommending that an individual be hired to perform a safety-sensitive function after such individual has received a verified posi-

and

c. Ensure that the individual has complied with the requirements of any rehabilitation program in which the individual participated following the verified positive pre-employment drug test result or the refusal to submit to a pre-employment test.

7. The MRO shall not recommend that a person who fails to satisfy the requirements in section VII, paragraph A.5 or A.6 of this appendix be hired to perform or returned to duty to perform a safety-sensitive function.

B. *MRO Determinations.* In the case of an employee or applicant who holds an airman medical certificate issued under part 67 of this chapter, or who is or would be required to hold such certificate in order to perform a safety-sensitive function for an employer, the MRO shall take the following actions after verifying a positive drug test result.

1. In addition to the evaluation required in section VII, paragraph A.4 of this appendix, the MRO shall make a determination of probable drug dependence or nondependence as specified in part 67 of this chapter within 10 working days of verifying the test result. If the MRO is unable to make such a determination, he or she should so state in the individual's records.

2. If the MRO determines that an individual is nondependent, the MRO may recommend that the individual be returned to duty or hired to perform safety-sensitive functions subject to the requirements of section VII, paragraph A.5 of this appendix. If the MRO makes a determination of probable drug dependence or cannot make a dependency determination, the MRO shall not recommend that the individual be returned to duty unless and until such individual has been found nondependent by or has received a special issuance medical certificate from the Federal Air Surgeon.

3. After making the determinations in section VII, paragraphs B.1 and B.2 of this appendix, the MRO must forward the names of such individuals with identifying information, the

C. *MRO Records.* Each MRO shall maintain records concerning drug tests performed under this rule in accordance with the following provisions:

1. All records shall be maintained in confidence and shall be released only in accordance with the provisions of this rule and 49 CFR part 40.

2. Records concerning drug tests confirmed positive by the laboratory shall be maintained for 5 years. Such records include the MRO copies of the custody and control form, medical interviews, documentation of the basis for verifying as negative test results confirmed as positive by the laboratory, any other documentation concerning the MRO's verification process, and copies of dependency determinations where applicable.

3. Records of confirmed negative test results shall be maintained for 12 months.

4. All records maintained pursuant to this rule by each MRO are subject to examination by the Administrator or the Administrator's representative at any time.

5. Should the employer change MROs for any reason, the employer shall ensure that the former MRO forwards all records maintained pursuant to this rule to the new MRO within 10 working days of receiving notice from the employer of the new MRO's name and address.

6. Any employer obtaining MRO services by contract, including a contract through a consortium, shall ensure that the contract includes a recordkeeping provision that is consistent with this paragraph, including requirements for transferring records to a new MRO.

D. *Evaluations and Referrals.* Each employer shall ensure that a substance abuse professional, including an MRO if he/she is qualified as a substance abuse professional, who determines that a covered employee requires assistance in resolving problems associated with illegal use of drugs does not refer the employee to the substance abuse professional's private practice or to a person or organization from which the substance abuse profes-

priate treatment under the employee's health insurance program; or

4. The sole source of therapeutically appropriate treatment reasonably accessible to the employee.

VIII. *Employee Assistance Program (EAP).* The employer shall provide an EAP for employees. The employer may establish the EAP as a part of its internal personnel services or the employer may contract with an entity that will provide EAP services to an employee. Each EAP must include education and training on drug use for employees and training for supervisors making determinations for testing of employees based on reasonable cause.

A. *EAP Education Program.* Each EAP education program must include at least the following elements: display and distribution of informational material; display and distribution of a community service hot-line telephone number for employee assistance; and display and distribution of the employer's policy regarding drug use in the workplace. The employer's policy shall include information regarding the consequences under the rule of using drugs while performing safety-sensitive functions, receiving a verified positive drug test result, or refusing to submit to a drug test required under the rule.

B. *EAP Training Program.* Each employer shall implement a reasonable program of initial training for employees. The employee training program must include at least the following elements: The effects and consequences of drug use on personal health, safety, and work environment; the manifestations and behavioral cues that may indicate drug use and abuse; and documentation of training given to employees and employer's supervisory personnel. The employer's supervisory personnel who will determine when an employee is subject to testing based on reasonable cause shall receive specific training on specific, contemporaneous physical, behavioral, and performance indicators of probable drug use in addition to the training specified above. The employer shall ensure that supervisors who will make reasonable cause determinations receive at

program plan to the Federal Aviation Administration, Office of Aviation Medicine, Drug Abatement Division (AAM–800), 400 7th Street, SW., Washington, DC 20590.

(2)(a) Any person who applies for a certificate under the provisions of part 121 or part 135 of this chapter after September 19, 1994 shall submit an antidrug program plan to the FAA for approval and must obtain such approval prior to beginning operations under the certificate. The program shall be implemented not later than the date of inception of operations. Contractor employees to a new certificate holder must be subject to an FAA-approved antidrug program within 60 days of the implementation of the employer's program.

(b) Any person who intends to begin sightseeing operations as an operator under 14 CFR 135.1(c) after September 19, 1994 shall, not later than 60 days prior to the proposed initiation of such operations, submit an antidrug program plan to the FAA for approval. No operator may begin conducting sightseeing flights prior to receipt of approval; the program shall be implemented concurrently with the inception of operations. Contractor employees to a new operator must be subject to an FAA-approved program within 60 days of the implementation of the employer's program.

(c) Any person who intends to begin air traffic control operations as an employer as defined in 14 CFR 65.46(a)(2) (air traffic control facilities not operated by the FAA or by or under contract to the U.S. military) after September 19, 1994 shall, not later than 60 days prior to the proposed initiation of such operations, submit an antidrug program plan to the FAA for approval. No air traffic control facility may begin conducting air traffic control operations prior to receipt of approval; the program shall be implemented concurrently with the inception of operations. Contractor employees to a new air traffic control facility must be subject to an FAA-approved program within

station shall implement its approved antidrug program in accordance with its terms.

(4) Any entity or individual whose employees perform safety-sensitive functions pursuant to a contract with an employer (as defined in section II of this appendix), and any consortium may submit an antidrug program plan to the FAA for approval on a form and in a manner prescribed by the Administrator.

(a) The plan shall specify the procedures that will be used to comply with the requirements of this appendix.

(b) Each consortium program must provide for reporting changes in consortium membership to the FAA within 10 working days of such changes.

(c) Each contractor or consortium shall implement its antidrug program in accordance with the terms of its approved plan.

(5) Each air traffic control facility operating under contract to the FAA shall submit an antidrug program plan to the FAA (specifying the procedures for all testing required by this appendix) not later than November 17, 1994. Each facility shall implement its antidrug program not later than 60 days after approval of the program by the FAA. Employees performing air traffic control duties by contract for the air traffic control facility (i.e., not directly employed by the facility) must be subject to an FAA-approved antidrug program within 60 days of implementation of the air traffic control facility's program.

(6) Each employer, or contractor company that has submitted an antidrug plan directly to the FAA, shall ensure that it is continuously covered by an FAA-approved antidrug program, and shall obtain appropriate approval from the FAA prior to changing [programs]* (e.g., joining another carrier's program, joining a consortium, or transferring to another consortium).

B. An employer's antidrug plan must specify the methods by which the employer will comply with the testing requirements of this appendix. The plan must provide the name and address of the laboratory notified to the contrary by the FAA, within 60 days after submission of the plan to the FAA.

X. *Reporting of Antidrug Program Results*

A. Annual reports of antidrug program results shall be submitted to the FAA in the form and manner prescribed by the Administrator by March 15 of the succeeding calendar year for the prior calendar year (January 1 through December 31) in accordance with the provisions below.

1. Each part 121 certificate holder shall submit an annual report each year.

2. Each entity conducting an antidrug program under an FAA-approved antidrug plan, other than a part 121 certificate holder, that has 50 or more employees performing a safety-sensitive function on January 1 of any calendar year shall submit an annual report to the FAA for that calendar year.

3. The Administrator reserves the right to require that aviation employers not otherwise required to submit annual reports prepare and submit such reports to the FAA. Employers that will be required to submit annual reports under this provision will be notified in writing by the FAA.

B. Each report shall be submitted in the form and manner prescribed by the Administrator. No other form, including another DOT Operating Administration's form, is acceptable for submission to the FAA.

C. Each report shall be signed by the employer's antidrug program manager or other designated representative.

D. Each report with verified positive drug test results shall include all of the following informational elements:

1. Number of covered employees by employee category.

2. Number of covered employees affected by the antidrug rule of another operating administration identified and reported by number and employee category.

7. Action taken following a verified positive drug test result(s), by type of action.

8. Number of employees returned to duty during the reporting period after having received a verified positive drug test result on or refused to submit to a drug test required under the FAA rule.

9. Number of employees by employee category with tests verified positive for multiple drugs by an MRO.

10. Number of employees who refused to submit to a drug test and the action taken in response to the refusal(s).

11. Number of covered employees who have received required initial training.

12. Number of supervisory personnel who have received required initial training.

13. Number of supervisors who have received required recurrent training.

E. Each report with only negative drug test results shall include all of the following informational elements. (This report may *only* be submitted by employers with *no* verified positive drug test results during the reporting year.)

1. Number of covered employees by employee category.

2. Number of covered employees affected by the antidrug rule of another operating administration identified and reported by number and employee category.

3. Number of specimens collected by type of test and employee category.

4. Number of negative tests reported by an MRO by type of test and employee category.

5. Number of employees who refused to submit to a drug test and the action taken in response to the refusal(s).

6. Number of employees returned to duty during the reporting period after having received a verified positive drug test result on or refused to submit to a drug test required under the FAA rule.

responsible for ensuring the accuracy and timeliness of each report prepared on its behalf by a consortium.

XI. *Preemption*

A. The issuance of 14 CFR parts 65, 121, and 135 by the FAA preempts any state or local law, rule, regulation, order, or standard covering the subject matter of 14 CFR parts 65, 121, and 135, including but not limited to, drug testing of aviation personnel performing safety-sensitive functions.

B. The issuance of 14 CFR parts 65, 121, and 135 does not preempt provisions of state criminal law that impose sanctions for reckless conduct of an individual that leads to actual loss of life, injury, or damage to property whether such provisions apply specifically to aviation employees or generally to the public.

XII. *Employees Located Outside the Territory of the United States*

A. No individual shall undergo a drug test required under the provisions of this appendix while located outside the territory of the United States.

1. Each employee who is assigned to perform safety-sensitive functions solely outside the territory of the United States shall be removed from the random testing pool upon the inception of such assignment.

2. Each covered employee who is removed from the random testing pool under this paragraph A shall be returned to the random testing pool when the employee resumes the performance of safety-sensitive functions wholly or partially within the territory of the United States.

B. The provisions of this appendix shall not apply to any person who performs a function listed in section III of this appendix by contract for an employer outside the territory of the United States.

Docket No. 25148 (53 FR 47057), Eff 11/21/88; (Amdt. 121–200, Eff. 12/21/88); (Amdt. 121–203, Eff. 4/14/89); (Amdt. 121–210, Eff. 12/27/89); (Amdt. 121–211, Eff. 2/2/90); (Amdt. 121–215, Eff. 3/22/90); (Amdt. 121–221, Eff. 2/11/90); (Amdt. 121–223, Eff. 4/24/91); (Amdt. 121–224, Eff. 4/

I. General

A. *Purpose.* The purpose of this appendix is to establish programs designed to help prevent accidents and injuries resulting from the misuse of alcohol by employees who perform safety-sensitive functions in aviation.

B. *Alcohol testing procedures.* Each employer shall ensure that all alcohol testing conducted pursuant to this appendix complies with the procedures set forth in 49 CFR part 40. The provisions of 49 CFR part 40 that address alcohol testing are made applicable to employers by this appendix.

C. *Definitions.*

As used in this appendix—

Accident means an occurrence associated with the operation of an aircraft which takes place between the time any person boards the aircraft with the intention of flight and the time all such persons have disembarked, and in which any person suffers death or serious injury or in which the aircraft receives substantial damage.

Administrator means the Administrator of the Federal Aviation Administration or his or her designated representative.

Alcohol means the intoxicating agent in beverage alcohol, ethyl alcohol, or other low molecular weight alcohols, including methyl or isopropyl alcohol.

Alcohol concentration (or content) means the alcohol in a volume of breath expressed in terms of grams of alcohol per 210 liters of breath as indicated by an evidential breath test under this appendix.

Alcohol use means the consumption of any beverage, mixture, or preparation, including any medication, containing alcohol.

Confirmation test means a second test, following a screening test with a result 0.02 or greater, that provides quantitative data of alcohol concentration.

Consortium means an entity, including a group or association of employers or contractors, that provides alcohol testing as required by this appendix and that acts on behalf of such employers or contractors, provided that it has submitted an alcohol misuse prevention program certification statement to the FAA in accordance with this appendix.

Contractor company means a company that has employees who perform safety-sensitive functions by contract for an employer.

Covered employee means a person who performs, either directly or by contract, a safety-sensitive function listed in section II of this appendix for an employer (as defined below). For purposes of pre-employment testing only, the term "covered employee" includes a person applying to perform a safety-sensitive function.

DOT agency means an agency (or "operating administration") of the United States Department of Transportation administering regulations requiring alcohol testing (14 CFR parts 65, 121, and 135; 49 CFR parts 199, 219, and 382) in accordance with 49 CFR part 40.

Employer means a part 121 certificate holder; a part 135 certificate holder; an air traffic control facility not operated by the FAA or by or under contract to the U.S. military; and an operator as defined in 14 CFR 135.1(c).

Performing (a safety-sensitive function): an employee is considered to be performing a safety-sensitive function during any period in which he or she is actually performing, ready to perform, or immediately available to perform such functions.

Refuse to submit (to an alcohol test) means that a covered employee fails to provide adequate breath for testing without a valid medical explanation after he or she has received notice of the requirement to be tested in accordance with this appendix, or engages in conduct that clearly obstructs the testing process.

Safety-sensitive function means a function listed in section II of this appendix.

Screening test means an analytical procedure to determine whether a covered employee may have a prohibited concentration of alcohol in his or her system.

employees (as reported under section IV of this appendix) found during random tests given under this appendix to have an alcohol concentration of 0.04 or greater plus the number of employees who refused a random test required by this appendix, divided by the total reported number of employees in the industry given random alcohol tests under this appendix plus the total reported number of employees in the industry who refuse a random test required by this appendix.

D. *Preemption of State and local laws.*

1. Except as provided in subparagraph 2 of this paragraph, these regulations preempt any State or local law, rule, regulation, or order to the extent that:

(a) Compliance with both the State or local requirement and this appendix is not possible; or

(b) Compliance with the State or local requirement is an obstacle to the accomplishment and execution of any requirement in this appendix.

2. The alcohol misuse requirements of this title shall not be construed to preempt provisions of State criminal law that impose sanctions for reckless conduct leading to actual loss of life, injury, or damage to property, whether the provisions apply specifically to transportation employees or employers or to the general public.

E. *Other requirements imposed by employers.*

Except as expressly provided in these alcohol misuse requirements, nothing in these requirements shall be construed to affect the authority of employers, or the rights of employees, with respect to the use or possession of alcohol, including any authority and rights with respect to alcohol testing and rehabilitation.

F. *Requirement for notice.*

Before performing an alcohol test under this appendix, each employer shall notify a covered employee that the alcohol test is required by this appendix. No employer shall falsely represent that a test is administered under this appendix.

3. Flight instruction duties.

4. Aircraft dispatcher duties.

5. Aircraft maintenance or preventive maintenance duties.

6. Ground security coordinator duties.

7. Aviation screening duties.

8. Air traffic control duties.

III. Tests Required

A. *Pre-employment.*

1. Prior to the first time a covered employee performs safety-sensitive functions for an employer, the employee shall undergo testing for alcohol. No employer shall allow a covered employee to perform safety-sensitive functions unless the employee has been administered an alcohol test with a result indicating an alcohol concentration less than 0.04. If a pre-employment test result under this paragraph indicates an alcohol concentration of 0.02 or greater but less than 0.04, the provisions of paragraph F of section V of this appendix apply.

2. An employer is not required to administer an alcohol test as required by this paragraph if:

(a) the employee has undergone an alcohol test required by this appendix or the alcohol misuse rule of another DOT agency under 49 CFR part 40 within the previous 6 months, with a result indicating an alcohol concentration less than 0.04; and

(b) the employer ensures that no prior employer of the covered employee of whom the employer has knowledge has records of a violation of §§ 65.46a, 121.458, or 135.253 of this chapter or the alcohol misuse rule of another DOT agency within the previous 6 months.

B. *Post-accident.*

1. As soon as practicable following an accident, each employer shall test each surviving covered employee for alcohol if that employee's performance of a safety-sensitive function either contributed to the accident or cannot be completely discounted

within 8 hours; and

(v) If blood alcohol testing could have been completed within eight hours, the name, address, and telephone number of the testing site where blood testing could have occurred.]

([c]) Notwithstanding the absence of a reasonable suspicion alcohol test under this section, no covered employee shall report for duty or remain on duty requiring the performance of safety-sensitive functions while the employee is under the influence of or impaired by alcohol, as shown by the behavioral, speech, or performance indicators of alcohol misuse, nor shall an employer permit the covered employee to perform or continue to perform safety-sensitive functions until:

(1) An alcohol test is administered and the employee's alcohol concentration measures less than 0.02; or

(2) The start of the employee's next regularly scheduled duty period, but not less than 8 hours following the determination made under paragraph 2 of this section that there is reasonable suspicion that the employee has violated the alcohol misuse provisions in §§ 65.46a, 121.458, or 135.253 of this chapter.

([d]) Except as provided in paragraph 4([c]), no employer shall take any action under this appendix against a covered employee based solely on the employee's behavior and appearance in the absence of an alcohol test. This does not prohibit an employer with authority independent of this appendix from taking any action otherwise consistent with law.

E. *Return to duty testing.*

Each employer shall ensure that before a covered employee returns to duty requiring the performance of a safety-sensitive function after engaging in conduct prohibited in §§ 65.46a, 121.458, or 135.253 of this chapter, the employee shall undergo a return to duty alcohol test with a result indicating an alcohol concentration of less than 0.02.

F. *Follow-up testing.*

perform safety-sensitive functions; or just after the employee has ceased performing such functions.

G. *Retesting of covered employees with an alcohol concentration of 0.02 or greater but less than, 0.04.*

Each employer shall retest a covered employee to ensure compliance with the provisions of section V, paragraph F of this appendix, if the employer chooses to permit the employee to perform a safety-sensitive function within 8 hours following the administration of an alcohol test indicating an alcohol concentration of 0.02 or greater but less than 0.04.

IV. Handling of Test Results, Record Retention, and Confidentiality

A. *Retention of records.*

1. *General Requirement.* Each employer shall maintain records of its alcohol misuse prevention program as provided in this section. The records shall be maintained in a secure location with controlled access.

2. *Period of Retention.* Each employer shall maintain the records in accordance with the following schedule:

(a) *Five years.* Records of employee alcohol test results with results indicating an alcohol concentration of 0.02 or greater, [records related to other violations of §§ 65.46a, 121.458, or 135.253 of this chapter,]* documentation of refusals to take required alcohol tests, calibration documentation, employee evaluations and referrals, and copies of any annual reports submitted to the FAA under this appendix shall be maintained for a minimum of 5 years.

(b) *Two years.* Records related to the collection process (except calibration of evidential breath testing devices) and training shall be maintained for a minimum of 2 years.

(c) *One year.* Records of all test results below 0.02 shall be maintained for a minimum of 1 year.

3. *Types of Records.* The following specific records shall be maintained.

(6) Documents generated in connection with decisions on post-accident tests.

(7) Documents verifying existence of a medical explanation of the inability of a covered employee to provide adequate breath for testing.

(b) Records related to test results:

(1) The employer's copy of the alcohol test form, including the results of the test;

(2) Documents related to the refusal of any covered employee to submit to an alcohol test required by this appendix.

(3) Documents presented by a covered employee to dispute the result of an alcohol test administered under this appendix.

(c) Records related to other violations of §§ 65.46a, [121.458]*, or 135.253 of this chapter.

(d) Records related to evaluations:

(1) Records pertaining to a determination by a substance abuse professional concerning a covered employee's need for assistance.

(2) Records concerning a covered employee's compliance with the recommendations of the substance abuse professional.

(3) Records of notifications to the Federal Air Surgeon of violations of the alcohol misuse prohibitions in this chapter by covered employees who hold medical certificates issued under part 67 of this chapter.

(e) Records related to education and training:

(1) Materials on alcohol misuse awareness, including a copy of the employer's policy on alcohol misuse.

(2) Documentation of compliance with the requirements of section VI, paragraph A of this appendix.

(3) Documentation of training provided to supervisors for the purpose of qualifying the supervisors to make a determination concerning the need for alcohol testing based on reasonable suspicion.

sions below.

(a) Each part 121 certificate holder shall submit an annual report each year.

(b) Each entity conducting an alcohol misuse prevention program under the provisions of this appendix, other than a part 121 certificate holder, that has 50 or more covered employees on January 1 of any calendar year shall submit an annual report to the FAA for that calendar year.

(c) The Administrator reserves the right to require employers not otherwise required to submit annual reports to prepare and submit such reports to the FAA. Employers that will be required to submit annual reports under this provision will be notified in writing by the FAA.

2. Each employer that is subject to more than one DOT agency alcohol rule shall identify each employee covered by the regulations of more than one DOT agency. The identification will be by the total number and category of covered function. Prior to conducting any alcohol test on a covered employee subject to the rules of more than one DOT agency, the employer shall determine which DOT agency rule or rules authorizes or requires the test. The test result information shall be directed to the appropriate DOT agency or agencies.

3. Each employer shall ensure the accuracy and timeliness of each report submitted.

4. Each report shall be submitted in the form and manner prescribed by the Administrator.

5. Each report shall be signed by the employer's alcohol misuse prevention program manager or other designated representative.

6. Each report that contains information on an alcohol screening test result of 0.02 or greater or a violation of the alcohol misuse provisions of §§ 65.46a, 121.458, or 135.253 of this chapter shall include the following informational elements:

(a) Number of covered employees by employee category.

(b) Number of covered employees in each category subject to alcohol testing under the alcohol

not promptly administered. If a test required by this section is not administered within 8 hours following the accident, the employer shall cease attempts to administer an alcohol test and shall prepare and maintain the same record. Records shall be submitted to the FAA upon request of the Administrator or his or her designee.

[(b) For the years stated in this paragraph, employers who submit MIS reports shall submit to the FAA each record of a test required by this section that is not completed within 8 hours. The employer's records of tests that are not completed within 8 hours shall be submitted to the FAA by March 15, 1996; March 15, 1997; and March 15, 1998; for calendar years 1995, 1996, and 1997, respectively. Employers shall append these records to their MIS submissions. Each record shall include the following information:

(i) Type of test (reasonable suspicion/post-accident);

(ii) Triggering event (including date, time, and location);

(iii) Employee category (do not include employee name or other identifying information);

(iv) Reason(s) test could not be completed within 8 hours; and

(v) If blood alcohol testing could have been completed within eight hours, the name, address, and telephone number of the testing site where blood testing could have occurred.]

3. A covered employee who is subject to post-accident testing shall remain readily available for such testing or may be deemed by the employer to have refused to submit to testing. Nothing in this section shall be construed to require the delay of necessary medical attention for injured people following an accident or to prohibit a covered employee from leaving the scene of an accident for the period necessary to obtain assistance in responding to the accident or to obtain necessary emergency medical care.

C. *Random testing.*

the quality and completeness of the reported data, may obtain additional information or reports from employers, and may make appropriate modifications in calculating the industry violation rate. Each year, the Administrator will publish in the *Federal Register* the minimum annual percentage rate for random alcohol testing of covered employees. The new minimum annual percentage rate for random alcohol testing will be applicable starting January 1 of the calendar year following publication.

3. (a) When the minimum annual percentage rate for random alcohol testing is 25 percent or more, the Administrator may lower this rate to 10 percent of all covered employees if the Administrator determines that the data received under the reporting requirements of this appendix for two consecutive calendar years indicate that the violation rate is less than 0.5 percent.

(b) When the minimum annual percentage rate for random alcohol testing is 50 percent, the Administrator may lower this rate to 25 percent of all covered employees if the Administrator determines that the data received under the reporting requirements of this appendix for two consecutive calendar years indicate that the violation rate is less than 1.0 percent but equal to or greater than 0.5 percent.

4. (a) When the minimum annual percentage rate for random alcohol testing is 10 percent, and the data received under the reporting requirements of this appendix for that calendar year indicate that the violation rate is equal to or greater than 0.5 percent but less than 1.0 percent, the Administrator will increase the minimum annual percentage rate for random alcohol testing to 25 percent of all covered employees.

(b) When the minimum annual percentage rate for random alcohol testing is 25 percent or less, and the data received under the reporting requirements of this appendix for that calendar year indicate that the violation rate is equal to or greater than 1.0 percent, the Administrator will increase the minimum annual percentage rate for random

made.

6. The employer shall randomly select a sufficient number of covered employees for testing during each calendar year to equal an annual rate not less than the minimum annual percentage rate for random alcohol testing determined by the Administrator. If the employer conducts random testing through a consortium, the number of employees to be tested may be calculated for each individual employer or may be based on the total number of covered employees who are subject to random alcohol testing at the same minimum annual percentage rate under this appendix or any DOT alcohol testing rule.

7. Each employer shall ensure that random alcohol tests conducted under this appendix are unannounced and that the dates for administering random tests are spread reasonably throughout the calendar year.

8. Each employer shall require that each covered employee who is notified of selection for random testing proceeds to the testing site immediately; provided, however, that if the employee is performing a safety-sensitive function at the time of the notification, the employer shall instead ensure that the employee ceases to perform the safety-sensitive function and proceeds to the testing site as soon as possible.

9. A covered employee shall only be randomly tested while the employee is performing safety-sensitive functions; just before the employee is to perform safety-sensitive functions; or just after the employee has ceased performing such functions.

10. If a given covered employee is subject to random alcohol testing under the alcohol testing rules of more than one DOT agency, the employee shall be subject to random alcohol testing at the percentage rate established for the calendar year by the DOT agency regulating more than 50 percent of the employee's functions.

11. If an employer is required to conduct random alcohol testing under the alcohol testing rules of more than one DOT agency, the employer may—

has reasonable suspicion to believe that the employee has violated the alcohol misuse prohibitions in §§ 65.46a, 121.458, or 135.253 of this chapter.

2. The employer's determination that reasonable suspicion exists to require the covered employee to undergo an alcohol test shall be based on specific, contemporaneous, articulable observations concerning the appearance, behavior, speech or body-odors of the employee. The required observations shall be made by a supervisor who is trained in detecting the symptoms of alcohol misuse. The supervisor who makes the determination that reasonable suspicion exists shall not conduct the breath alcohol test on that employee.

3. Alcohol testing is authorized by this section only if the observations required by paragraph 2 are made during, just preceding, or just after the period of the work day that the covered employee is required to be in compliance with this rule. An employee may be directed by the employer to undergo reasonable suspicion testing for alcohol only while the employee is performing safety-sensitive functions; just before the employee is to perform safety-sensitive functions; or just after the employee has ceased performing such functions.

4. (a) If a test required by this section is not administered within 2 hours following the determination made under paragraph 2 of this section, the employer shall prepare and maintain on file a record stating the reasons the test was not promptly administered. If a test required by this section is not administered within 8 hours following the determination made under paragraph 2 of this section, the employer shall cease attempts to administer an alcohol test and shall state in the record the reasons for not administering the test.

[(b) For the years stated in this paragraph, employers who submit MIS reports shall submit to the FAA each record of a test required by this section that is not completed within 8 hours. The employer's records of tests that are not completed within 8 hours shall be submitted to the FAA by March 15, 1996; March 15, 1997; and March 15,

ing an alcohol concentration of 0.04 or greater, by type of test and employee category.

(f) Number of persons denied a position as a covered employee following a pre-employment alcohol test indicating an alcohol concentration of 0.04 or greater.

(g) Number of covered employees with a confirmation alcohol test indicating an alcohol concentration of 0.04 or greater who were returned to duty in covered positions (having complied with the recommendations of a substance abuse professional as described in section V, paragraph E, and section VI, paragraph C of this appendix).

(h) Number of covered employees who were administered alcohol and drug tests at the same time, with both a positive drug test result and an alcohol test result indicating an alcohol concentration of 0.04 or greater.

(i) Number of covered employees who were found to have violated other alcohol misuse provisions of §§ 65.46a, 121.458, or 135.253 of this chapter, and the action taken in response to the violation.

(j) Number of covered employees who refused to submit to an alcohol test required under this appendix, the number of such refusals that were for random tests, and the action taken in response to each refusal.

(k) Number of supervisors who have received required training during the reporting period in determining the existence of reasonable suspicion of alcohol misuse.

7. Each report with no screening test results of 0.02 or greater or violations of the alcohol misuse provisions of §§ 65.46a, 121.458, or 135.253 of this chapter shall include the following informational elements. (This report may *only* be submitted if the program results meet these criteria.)

(a) Number of covered employees by employee category.

(b) Number of covered employees in each category subject to alcohol testing under the alcohol to submit to an alcohol test required under this appendix, and the action taken in response to each refusal.

(f) Number of supervisors who have received required training during the reporting period in determining the existence of reasonable suspicion of alcohol misuse.

8. An FAA-approved consortium may prepare reports on behalf of individual aviation employers for purposes of compliance with this reporting requirement. However, the aviation employer shall sign and submit such a report and shall remain responsible for ensuring the accuracy and timeliness of each report prepared on its behalf by a consortium.

C. *Access to records and facilities.*

1. Except as required by law or expressly authorized or required in this appendix, no employer shall release covered employee information that is contained in records required to be maintained under this appendix.

2. A covered employee is entitled, upon written request, to obtain copies of any records pertaining to the employee's use of alcohol, including any records pertaining to his or her alcohol tests. The employer shall promptly provide the records requested by the employee. Access to an employee's records shall not be contingent upon payment for records other than those specifically requested.

3. Each employer shall make available copies of all results of alcohol testing conducted under this appendix and any other information pertaining to the employer's alcohol misuse prevention program, when requested by the Secretary of Transportation or any DOT agency with regulatory authority over the employer or covered employee.

4. When requested by the National Transportation Safety Board as part of an accident investigation, each employer shall disclose information related to the employer's administration of a post-accident alcohol test administered following the accident under investigation.

alcohol test administered under this appendix or from the employer's determination that the employee engaged in conduct prohibited under §§ 65.46a, 121.458, or 135.253 of this chapter (including, but not limited to, a worker's compensation, unemployment compensation, or other proceeding relating to a benefit sought by the employee).

7. An employer shall release information regarding a covered employee's records as directed by the specific, written consent of the employee authorizing release of the information to an identified person. Release of such information by the person receiving the information is permitted only in accordance with the terms of the employee's consent.

8. Each employer shall permit access to all facilities utilized in complying with the requirements of this appendix to the Secretary of Transportation or any DOT agency with regulatory authority over the employer or any of its covered employees.

V. Consequences for Employees Engaging in Alcohol-Related Conduct

A. *Removal from safety-sensitive function.*

1. Except as provided in section VI of this appendix, no covered employee shall perform safety-sensitive functions if the employee has engaged in conduct prohibited by §§ 65.46a, 121.458, or 135.253 of this chapter or an alcohol misuse rule of another DOT agency.

2. No employer shall permit any covered employee to perform safety-sensitive functions if the employer has determined that the employee has violated this paragraph.

B. *Permanent disqualification from service.*

An employee who violates §§ 65.46a(c), 121.458(c), or 135.253(c) [of this chapter or who engages in alcohol use that violates another alcohol misuse provision of §§ 65.46a, 121.458, or 135.253 of this chapter and had previously engaged in alcohol use that violated the provisions of §§ 65.46a, 121.458, or 135.253 of this chapter after becoming within 2 working days.

2. Each such employer shall forward to the Federal Air Surgeon a copy of the report of any evaluation performed under the provisions of section VI of this appendix within 2 working days of the employer's receipt of the report.

3. All documents shall be sent to the Federal Air Surgeon, Office of Aviation Medicine, Drug Abatement Division (AAM–800), 400 7th Street SW., Washington, DC 20590.

4. No covered employee who holds a part 67 airman medical certificate shall perform safety-sensitive duties for an employer following a violation until and unless the Federal Air Surgeon has recommended that the employee be permitted to perform such duties.

D. *Notice of refusals.*

1. Except as provided in subparagraph 2 of this paragraph [D]*, each employer shall notify the FAA [within 5 working days]* of any covered employee who holds a certificate issued under [14 CFR]* part 61, part 63, or part 65 who has refused to submit to an alcohol test required under this appendix. Notifications should be sent to: Federal Aviation Administration, Aviation Standards National Field Office, Airmen Certification Branch, AVN–460, P.O. Box 25082, Oklahoma City, OK 73125.

2. An employer is not required to notify the [above office]* of refusals to submit to pre-employment alcohol tests or refusals to submit to return to duty tests.

E. *Required evaluation and testing.*

No covered employee who has engaged in conduct prohibited by §§ 65.46a, 121.458, or 135.253 of this chapter shall perform safety-sensitive functions unless the employee has met the requirements of section VI, paragraph C of this appendix. No employer shall permit a covered employee who has engaged in such conduct to perform safety-sensitive functions unless the employee has met the requirements of section VI, paragraph C of this appendix.

F. *Other alcohol-related conduct.*

scheduled duty period, but not less than 8 hours following administration of the test.

2. Except as provided in subparagraph 1 of this paragraph, no employer shall take any action under this rule against an employee based solely on test results showing an alcohol concentration less than 0.04. This does not prohibit an employer with authority independent of this rule from taking any action otherwise consistent with law.

VI. Alcohol Misuse Information, Training, and Referral

A. *Employer obligation to promulgate a policy on the misuse of alcohol.*

1. *General requirements.* Each employer shall provide educational materials that explain these alcohol misuse requirements and the employer's policies and procedures with respect to meeting those requirements.

(a) The employer shall ensure that a copy of these materials is distributed to each covered employee prior to the start of alcohol testing under the employer's FAA-mandated alcohol misuse prevention program and to each person subsequently hired for or transferred to a covered position.

(b) Each employer shall provide written notice to representatives of employee organizations of the availability of this information.

2. *Required content.* The materials to be made available to employees shall include detailed discussion of at least the following:

(a) The identity of the person designated by the employer to answer employee questions about the materials.

(b) The categories of employees who are subject to the provisions of these alcohol misuse requirements.

(c) Sufficient information about the safety-sensitive functions performed by those employees to make clear what period of the work day the covered employee is required to be in compliance with these alcohol misuse requirements.

mit to alcohol tests administered in accordance with this appendix.

(h) An explanation of what constitutes a refusal to submit to an alcohol test and the attendant consequences.

(i) The consequences for covered employees found to have violated the prohibitions in this chapter, including the requirement that the employee be removed immediately from performing safety-sensitive functions, and the procedures under section VI of this appendix.

(j) The consequences for covered employees found to have an alcohol concentration of 0.02 or greater but less than 0.04.

(k) Information concerning the effects of alcohol misuse on an individual's health, work, and personal life; signs and symptoms of an alcohol problem; and available methods of evaluating and resolving problems associated with the misuse of alcohol; and intervening when an alcohol problem is suspected, including confrontation, referral to any available employee assistance program, and/or referral to management.

(l) Optional provisions. The materials supplied to covered employees may also include information on additional employer policies with respect to the use or possession of alcohol, including any consequences for an employee found to have a specified alcohol level, that are based on the employer's authority independent of this appendix. Any such additional policies or consequences must be clearly and obviously described as being based on independent authority.

B. *Training for supervisors.*

Each employer shall ensure that persons designated to determine whether reasonable suspicion exists to require a covered employee to undergo alcohol testing under section II of this appendix receive at least 60 minutes of training on the physical, behavioral, speech, and performance indicators of probable alcohol misuse.

C. *Referral. evaluation, and treatment.*

135.253 of this chapter shall be evaluated by a substance abuse professional who must determine what assistance, if any, the employee needs in resolving problems associated with alcohol misuse.

3. (a) Before a covered employee returns to duty requiring the performance of a safety-sensitive function after engaging in conduct prohibited by §§ 65.46a, 121.458, or 135.253 of this chapter, the employee shall undergo a return-to-duty alcohol test with a result indicating an alcohol concentration of less than 0.02.

(b) In addition, each covered employee identified as needing assistance in resolving problems associated with alcohol misuse—

(i) Shall be evaluated by a substance abuse professional to determine whether the employee has properly followed any rehabilitation program prescribed under subparagraph 2 of this paragraph, and,

(ii) Shall be subject to unannounced follow-up alcohol tests administered by the employer following the employee's return to duty. The number and frequency of such follow-up testing shall be determined by a substance abuse professional, but shall consist of at least six tests in the first 12 months following the employee's return to duty. The employer may direct the employee to undergo testing for drugs (both return to duty and follow-up), in addition to alcohol testing, if the substance abuse professional determines that drug testing is necessary for the particular employee. Any such drug testing shall be conducted in accordance with the requirements of 49 CFR part 40. Follow-up testing shall not exceed 60 months from the date of the employee's return to duty. The substance abuse professional may terminate the requirement for follow-up testing at any time after the first six tests have been administered, if the substance abuse professional determines that such testing is no longer necessary.

4. Evaluation and rehabilitation may be provided by the employer, by a substance abuse professional under contract with the employer, or by a substance abuse professional who receives remuneration or in which the substance abuse professional has a financial interest. This paragraph does not prohibit a substance abuse professional from referring an employee for assistance provided through—

(a) a public agency, such as a State, county, or municipality;

(b) the employer or a person under contract to provide treatment for alcohol problems on behalf of the employer;

(c) the sole source of therapeutically appropriate treatment under the employee's health insurance program; or

(d) the sole source of therapeutically appropriate treatment reasonably accessible to the employee.

6. The requirements of this paragraph with respect to referral, evaluation, and rehabilitation do not apply to applicants who refuse to submit to pre-employment testing or have a pre-employment test with a result indicating an alcohol concentration of 0.04 or greater.

VII. Employer's Alcohol Misuse Prevention Program

A. *Schedule for submission of certification statements and implementation.*

1. Each employer shall submit an alcohol misuse prevention program (AMPP) certification statement as prescribed in paragraph B of section VII of this appendix, in duplicate, to the FAA, Office of Aviation Medicine, Drug Abatement Division (AAM–800), 400 7th Street SW., Washington, DC 20590, in accordance with the schedule below.

(a) Each employer that holds a part 121 certificate, each employer that holds a part 135 certificate and directly employs more than 50 covered employees, and each air traffic control facility affected by this rule shall submit a certification statement to the FAA by July 1, 1994. Each employer must implement an AMPP meeting the requirements of this appendix by January 1, 1995. Contractor employees to these employers must be subject to

(c) Each employer that holds a part 135 certificate and directly employs ten or fewer covered employees, and each operator as defined in 14 CFR 135.1(c) shall submit a certification statement to the FAA by July 1, 1995. Each employer must implement an AMPP meeting the requirements of this appendix by January 1, 1996. Contractor employees to these employers must be subject to an AMPP meeting the requirements of this appendix by July 1, 1996.

2. A company providing covered employees by contract to employers may be authorized by the FAA to establish an AMPP under the auspices of this appendix by submitting a certification statement meeting the requirements of paragraph B of section VII of this appendix directly to the FAA. Each contractor company that establishes an AMPP shall implement its AMPP in accordance with the provisions of this appendix.

(a) The FAA may revoke its authorization in the case of any contractor company that fails to properly implement its AMPP.

(b) No employer shall use a contractor company's employee who is not subject to the employer's AMPP unless the employer has first determined that the employee is subject to [the contractor company's]* FAA-mandated AMPP.

3. A consortium may be authorized to establish a consortium AMPP under the auspices of this appendix by submitting a certification statement meeting the requirements of paragraph B of section VII of this appendix directly to the FAA. Each consortium that so certifies shall implement the AMPP on behalf of the consortium members in accordance with the provisions of this appendix.

(a) The FAA may revoke its authorization in the case of any consortium that fails to properly implement the AMPP.

(b) Each employer that participates in an FAA-approved consortium remains individually responsible for ensuring compliance with the provisions of these alcohol misuse requirements and must maintain all records required under section IV of this appendix.

graph A.1. of this section, whichever is later. Contractor employees to a new certificate holder must be subject to an FAA-mandated AMPP within 180 days of the implementation of the employer's AMPP.

5. Any person who intends to begin air traffic control operations as an employer as defined in 14 CFR 65.46(a)(2) (air traffic control facilities not operated by the FAA or by or under contract to the U.S. military) after March 17, 1994, shall, not later than 60 days prior to the proposed initiation of such operations, submit an alcohol misuse prevention program certification statement to the FAA. The AMPP shall be implemented concurrently with the inception of operations or by the date specified in paragraph A.1 of this section, whichever is later. Contractor employees to a new air traffic control facility must be subject to an FAA-approved program within 180 days of the implementation of the facility's program.

6. Any person who intends to begin sightseeing operations as an operator under 14 CFR 135.1(c) after the effective date of the final rule shall, not later than 60 days prior to the proposed initiation of such operations, submit an alcohol misuse prevention program (AMPP) certification statement to the FAA. The AMPP shall be implemented concurrently with the inception of operations or by the date specified in paragraph A.1 of this section, whichever is later. Contractor employees to a new operator must be subject to an FAA-mandated AMPP within 180 days of the implementation of the employer's AMPP.

7. The duplicate certification statement shall be annotated indicating receipt by the FAA and returned to the employer, contractor company, or consortium.

8. Each consortium that submits an AMPP certification statement to the FAA must receive actual notice of the FAA's receipt of the statement prior to performing services as an FAA-approved consortium under this appendix on behalf of employers or contractor companies.

ments.

1. Each AMPP certification statement submitted by an employer or a contractor company shall provide the following information:

(a) the name, address, and telephone number of the employer/contractor company and for the employer/contractor company AMPP manager;

(b) FAA operating certificate number (if applicable);

(c) the date on which the employer or contractor company will implement its AMPP;

(d) if the submitter is a consortium member, the identity of the consortium; and

(e) a statement signed by an authorized representative of the employer or contractor company certifying an understanding of and agreement to comply with the provisions of the FAA's alcohol misuse prevention regulations.

2. Each consortium certification statement shall provide the following information:

VIII. Employees Located Outside the U.S.

A. No covered employee shall be tested for alcohol misuse while located outside the territory of the United States.

1. Each covered employee who is assigned to perform safety-sensitive functions solely outside the territory of the United States shall be removed from the random testing pool upon the inception of such assignment.

2. Each covered employee who is removed from the random testing pool under this paragraph shall be returned to the random testing pool when the employee resumes the performance of safety-sensitive functions wholly or partially within the territory of the United States.

B. The provisions of this appendix shall not apply to any person who performs a safety-sensitive function by contract for an employer outside the territory of the United States.

(Amdt. 121–237, Eff. 3/17/94); [(Amdt. 121–237*, Eff. 10/21/94)]; [(Amdt. 121–245, Eff. 1/1/95)]

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